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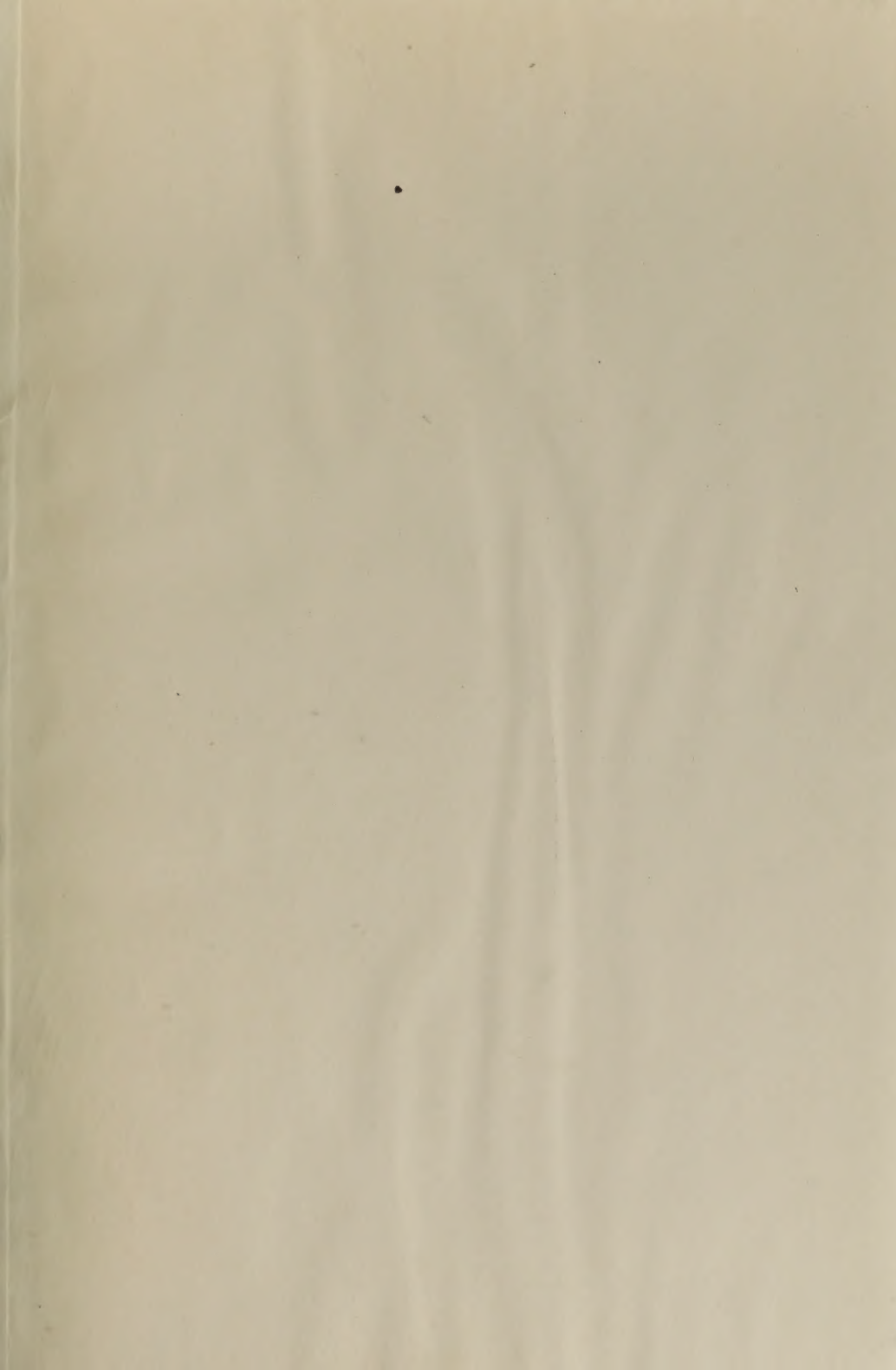
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1336 United States 1336
Circuit Court of Appeals

For the Ninth Circuit.

CHARLES E. WARREN and MABEL D.
WARREN,

Plaintiffs in Error,

vs.

F. GENN BROMLEY,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

FILED
JAN 8 - 1923
F. D. MONKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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BERT SCHLESINGER, Esq., First National
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EDWIN A. WILCOX, Esq., and Messrs. FRY &
JENKINS, San Jose, California,
Attorneys for Plaintiffs in Error.
ARTHUR H. BARENDT, Esq., Mills Building,
San Francisco, Calif.,
Attorneys for Defendant in Error.

The District Court of the United States, for the
Southern Division of the Northern District of
California.

(No. 16,576.)

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D. WAR-
REN.

Defendants.

Complaint.

DAMAGES—BREACH OF CONTRACT—CON-
VERSION.

Comes now F. Genn Bromley, the plaintiff herein,
and for his cause of action alleges:

I.

That he is a citizen of the British Empire and a
subject of the King of England; that the defendants

are and each of them is, a citizen of the State of California, residing at Cupertino, in the County of Santa Clara in said state, and they are inhabitants of the Southern Division of the Northern District of California.

II.

That on the first day of December, 1919, plaintiff and defendants entered into an agreement of purchase and sale of certain acreage devoted mainly to the raising of fruit, located on the Homestead Road, near Cupertino, in the county of Santa Clara, State of California, and certain personal property situated on the said acreage property; that attached to this complaint and made a part of hereof is a full, true and correct copy of said contract, containing a description of said acreage property by metes and bounds, and an itemized statement of all said personal property.

Said contract so attached hereto is marked Exhibit "A" and made a part hereof, and plaintiff pleads said contract in all [1*] terms and conditions as though it were here set forth *in haec verba*.

That under the terms of said contract plaintiff was obligated at the time of the execution thereof to pay, and he did pay, to defendants the sum of Six Thousand (\$6,000) Dollars, lawful money of the United States, as a first payment on account of the purchase price of said property in said contract described; that the balance of the purchase price, to wit, the sum of \$45,000, was by the terms of said

*Page-number appearing at foot of page of original certified Transcript of Record.

contract to be paid as in said contract provided, on or before five years from the said 1st day of December, 1919, with interest at the rate of six (6%) per cent per annum, payable annually; that payment of said interest and of the balance of the principal payable under said contract, it was expressly provided in said contract should be made by the defendants retaining title to sixty (60%) per cent of the crop grown on the orchard each year during the life of the contract, and that as said crop was disposed of annually the defendants should receive sixty per cent of the proceeds of said crop, which proceeds as stated in said contract, were to be credited by them to unpaid interest and the balance of the principal due them from plaintiff under said contract.

That it is also provided that plaintiff should farm the premises subject matter of the said contract or purchase and sale, in a first class farmer-like and orchardist-like manner; prune the trees, remove as far as possible all borers from the roots of trees, remove dead trees and replant the same with apricot or prune trees and irrigate the orchard each year when water was available and eradicate all rodents and pests and perform such other duties as are set forth in said contract as to the nature of which reference is hereby made to said Exhibit "A."

III.

That plaintiff entered into the immediate possession and occupation of said acreage property and the whole thereof, and commenced and continued thereafter during the entire year of 1920, to farm

said land in a first-class farmer-like and orchardist-like [2] manner; that plaintiff found said orchard in a much rundown and neglected condition; and it was necessary to expend large sums of money in its rehabilitation and plaintiff has expended a sum exceeding \$3,825.00 in the rehabilitation of said orchard in so much that the value of said property has been greatly enhanced; and plaintiff invested the sum of \$4,000 or thereabouts in the purchase of tools, machinery and implements necessary to the proper farming of said fruit ranch and all of said tools, machinery and implements were delivered to, and used in the cultivation of, said orchard.

That the year 1920 was one of exceptional drouth and was the fourth successive dry year in the said county of Santa Clara, and there was neither rainfall nor water available for the adequate irrigation of said ranch, nevertheless plaintiff irrigated said acreage to the utmost capacity of the water actually available and by reason of the care in cultivating and the labor bestowed upon the land and trees on said property, plaintiff succeeded in raising crops the equal of any produced on any similarly situated land devoted to the cultivation of like fruits; and plaintiff has thereby increased the value of said acreage during his tenure thereof.

That in accordance with the terms and conditions of said contract, plaintiff, with the knowledge and consent of defendants, sold all the grapes raised upon said land at a price agreeable to said defendants, and on receipt of the sale price thereof, to wit, on or about the 5th day of November, 1920, paid to

them the sum of \$310.10, being sixty (60%) per cent of the said sale price of all of said crop of grapes.

That plaintiff, with the knowledge and consent of defendants, delivered to the California Prune & Apricot Growers Inc., a total of 32,422 pounds of prunes, said delivery being paid for in instalments, to wit, on the 27th day of September, 1920, and the 13th day of November, 1920, and at the express request and order of plaintiff, defendants were credited by said California Prune & Apricot Growers [3] Inc., with sixty (60%) per cent of the said crop of prunes, and said incorporation last mentioned was instructed to pay and paid, on the said last-mentioned dates to defendants sixty (60%) per cent of the first payment made by it for said prunes under said delivery, and defendants have received to be by them applied to the payment of the principal and the unpaid interest under their said contract with plaintiff, the sum of \$1,567.18 in addition to the said \$313.10 hereinbefore mentioned; that plaintiff is informed and believes and therefore alleges that the balance thereof to be paid to and received by defendants from California Prune & Apricot Growers Inc., and to be by defendants applied to the payment of principal and unpaid interest will be the sum of \$1,000.

That with the knowledge and consent of defendants plaintiff delivered to the California Co-operative Canneries from the crops raised by him on said fruit ranch and at various times during the late summer and early fall of the year 1920, 5,545 pounds of pears, 816 pounds of free peaches; 170 pounds of

cling peaches and 23,158 pounds of apricots, and immediately and in person notified said California Co-operative Canneries that sixty (60%) per cent of all of said fruit and the proceeds of sale thereof belonged to and should be credited to defendants, and such credit was immediately thereupon given by said canneries to said defendants; that the value of all of said fruit was and is not less than the sum of \$5,000, and the said sixty per cent credit thereof to be applied by defendants to the balance of said principal and unpaid interest under said contract is the sum of \$3,000.

That all of said payments on account of said principal and unpaid interest so made by plaintiff to defendants as provided for and agreed upon in said contract, were accepted by them.

That it was provided and agreed by the terms of said contract that payment of the unpaid interest should be made by defendants by crediting the plaintiff on account of the unpaid [4] interest, the said sixty per cent of said crops, and by applynig the proceeds of said sixty per cent of said crops when disposed of, by defendants to the said unpaid interest and said balance of said unpaid purchase price, and by adding to the said principal any unpaid interest at the time of the sale and disposal of said sixty per cent of said crops, and that said unpaid interest should also bear interest at the rate of six per cent per annum in the same manner as the unpaid balance of said principal.

IV.

That plaintiff on or about September 30th, 1920,

placed said ranch property in the temporary care of a competent foreman and went to San Francisco; that during his said absence and on about the 1st day of December, 1920, the defendants, wrongfully and unlawfully and without the knowledge or consent of the plaintiff, entered upon, seized and occupied and appropriated to their own use all of the said land and premises and all the personal property described in said contract, together with all the said property placed thereon by plaintiff, and claimed that plaintiff had broken his said contract and that they were entitled to take over and resume possession of said real property and all the personalty on said ranch, and claimed that plaintiff had forfeited all right, title and interest in and to said real and personal property and the whole thereof, including the said sum of \$6,000, paid in cash by plaintiff to defendants on December 1st, 1919, as hereinbefore set forth, together with all moneys received by defendants from the sale of said fruit crops and all of the said balance of said 60% of said crops then unsold, and defendants ever since have held and possessed and do now retain and hold and possess without any legal or other right all of said property and have excluded and now do exclude plaintiff therefrom, and have violated and broken their contract with plaintiff.

That plaintiff has duly and fully performed all the terms and conditions of said contract on his part to be performed. [5]

That by the said acts and conduct of defendants and by their said breach of their said contract

with plaintiff, defendants have caused great loss and damage to plaintiff and plaintiff alleges that he has been damaged thereby in the sum of exceeding \$12,025, which said damages suffered thereby by plaintiff are, the said sum of \$6,000, paid to defendants under said contract on December 1st, 1919; the sum of \$3,525 paid, laid out and expended by plaintiff for help in the farming of said property and for the value of his own labor thereon and \$2,500 which plaintiff alleges to be the enhanced value of said property resulting from the labor and care bestowed thereon by plaintiff.

V.

That defendants have not paid to plaintiff any part of the said sum of \$12,025, or of the said sum of \$6,000, or of the said sum of \$3,525, or of the said sum of \$2,500.

And as a further, separate and distinct cause of action, plaintiff complains of defendants and alleges:

I.

Plaintiff here repeats and pleads as fully as though here set forth and hereby alleges all the allegations set forth in the several paragraphs of the first cause of action herein, and further alleges:

II.

That defendants, on or about December 1st, 1920, wrongfully and unlawfully took and have since held possession of and converted to their own use and have deprived plaintiff of the rightful

possession of the following described personal property of the value set opposite each item of personal property, viz:

One tractor	of the value of.....	\$1,575.00
One bean sprayer	of the value of.....	530.00
Hay for feed	of the value of.....	179.63
Lumber	of the value of.....	56.75

[6]

One cultivator	of the value of.....	150.00
One disc	of the value of.....	190.00
300 fruit trays	of the value of.....	300.00
150 large boxes	of the value of.....	100.00
Chickens	of the value of.....	100.00
Cook-stove	of the value of.....	20.00
Carpet	of the value of.....	150.00
Riding-horse	of the value of.....	100.00
Grass rug	of the value of.....	27.00
Ice-chest	of the value of.....	30.00
Window-screens	of the value of.....	10.00
Brass Curtain		
Rods	of the value of.....	15.00
Linoleum	of the value of.....	38.00
Trunk and other		

personal effects of the value of..... 200.00

That plaintiff, at the time of said wrongful conversion, was the owner and entitled to the exclusive possession of all of said personal property, and the aggregate value thereof was and is the sum of \$3,771.38 or thereabouts.

III.

That demand has been made upon defendants for the return of said personal property, but said

property has not, nor has any portion thereof, been returned to plaintiff,

WHEREFORE, plaintiff prays judgment against defendants:

(a) For the sum of \$6,000, money paid on account of the purchase price of the property in this complaint described.

(b) For the sum of \$6,025, for moneys laid out and expended in the cultivation of said ranch and for tools, implements and machinery; and the enhancement in value of said ranch due to the care and labor bestowed thereon by plaintiff.

(c) For such further sum as the Court may find plaintiff is entitled to recover for breach of contract by defendants.

(d) For the said value of all the said property wrongfully converted to their own use by defendants, in the sum of \$3,771.38.

(e) For costs of suit.

(f) For such other and further relief as may be meet in the premises.

ARTHUR H. BARENDT,
Attorney for Plaintiff. [7]

State of California,
City and County of San Francisco,—ss.

Arthur H. Barendt, being first duly sworn, deposes and says:

That he is the attorney for F. Genn Bromley, the plaintiff in the foregoing action; that he has read and is familiar with the complaint and knows of his own knowledge that the same is true except as to matters therein stated on his information and

belief and as to them he believes it to be true; that he makes this verification for and in behalf of the plaintiff for the reason that the plaintiff is absent from the Southern Division of the Northern District of California and from the City and County of San Francisco, where his attorney resides.

ARTHUR H. BARENDT.

Subscribed and sworn to before me, this 27th day of June, 1921.

[Seal]

EUGENE LEVY,
Notary Public in and for the City and County of
San Francisco, State of California. [8]

Exhibit "A."

THIS AGREEMENT, made and entered into this first day of December, A. D. 1919, by and between Chas. E. Warren and Mabel D. Warren, his wife, the parties of the first part and F. Genn Bromley, the party of the second part;

WITNESSETH: That the said parties of the first part hereby agree to sell to the said party of the second part, and the said party of the second part agrees to buy and pay for on the terms and conditions and subject to the reservations herein provided all of the following described property, situate, lying and being in the county of Santa Clara, State of California, and particularly described as follows, to wit:

Beginning at a point on the south line of the Homestead Road, formerly known as Emerson or Young Road, which point is west 5 rods from the

section line between sections 10 and 11, Township Seven (7) South, Range 2 West, and is the Northwest corner of the land now or formerly owned by Henrietta Krieg (the late widow of Jacob Smith, deceased) and formerly owned by E. Harrison; thence South along the West line of said lands of Krieg, to the Southwest corner of lands owned by said Krieg; thence at right angles Westerly to the center line of the Cupertino Creek; thence Northerly down said creek following its meanderings and the center line thereof to the South line of the Homestead, Emerson or Young Road; thence Easterly and along said South side of said Road to the place of beginning; containing 55.55 acres of land, more or less, and being parts of lots 5 and 6 and part of the Northeast quarter of the Southeast quarter of Section 10, Township 7 South, Range 2 West, M. D. B. and M. Saving and excepting that portion thereof containing 3.94 acres of land, more or less conveyed by said Pedro M. Lusson to the San Jose-Los Gatos Interurban Railway Company, by deed dated January 16, 1905, and recorded [9] January 27, 1905, in the office of said County Recorder in Volume 289 of Deeds, at page 49, Records of Santa Clara County, California.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, including all water rights.

Also the personal property on said real property, a list of which is hereby attached and made a part hereof.

2. That the full purchase price for said property to be paid by the said party of the second part to the parties of the first part shall be the sum of Fifty-one Thousand (\$51,000) Dollars, lawful money of the United States, of which the sum of Six Thousand (\$6,000) Dollars is to be paid upon the execution and delivery of this agreement, the receipt whereof is hereby acknowledged.

3. The balance of said purchase price, to wit: the sum of Forty-five Thousand (\$45,000) Dollars shall be paid in lawful money of the United States of America on or before five years from this date, together with interest thereon from date until paid at the rate of six per cent per annum, payable annually, and if not paid as it becomes due, it shall be added to the principal, become a part thereof and thereafter bear interest at the same rate.

4. It is understood and agreed that the party of the second part will take immediate possession of said premises and during the life of this contract, he shall farm said premises in a first class farmer-like and orchardist-like manner; that he will prune said trees at the proper time each year and so far as is possible remove all borers from the roots of the same; that he will remove all dead trees and as soon as customary thereafter, replant the same with apricot or prune trees. That he will irrigate the orchard each year when the water is available; that he will eradicate all rodents and other pests so far as it is [10] reasonably possible and spray the pear trees each year as often as it is customary so to do.

5. That the party of the second part will pick and gather said fruit when ripe and shall market the same in a first-class manner in accordance with the usual custom of orchardists in Santa Clara Valley.

6. That the parties hereto agreed that the title to sixty (60%) per cent of the crop grown on said orchard each year hereafter during the life of this contract shall remain in the parties of the first part until the same is sold and the proceeds disposed of in the manner provided for in this contract.

7. It is understood and agreed that when said crop is ready for the market, the party of the second part will notify the parties of the first part that he is ready to sell and state the price at which he is willing to sell, and if said price is the market price for the fruit at that time, the parties hereto agree to consent to the sale of said fruit and shall thereupon sell said fruit in the joint names of the parties of the first part and the party of the second part in the proportion of 60% in the name of the parties of the first part and 40% in the name of the party of the second part, and the portion which shall go to the parties of the first part shall be by them credited on unpaid interest and the balance on the principal thereof, as herein agreed.

8. It is understood and agreed that if said fruit is turned into the California Prune and Apricot Growers' Association it shall be received and paid for in the same proportion and for the same purposes as herein agreed.

9. It is understood and agreed that the parties of the first part may any time enter upon said premises and inspect the same and that the said party of the second part will keep all [11] fences, buildings, trays and boxes now on said premises in good repair.

10. The party of the second part agrees to pay all taxes and assessments of whatever description which shall be hereafter assessed against said property until the payment of the full purchase price herein agreed to be paid.

11. The party of the second part shall keep all buildings which are now on, or which may be hereafter erected on said premises, and the trays and boxes insured against loss or damage by fire, to the amount of at least \$5,000.00 in some insurance company or companies to be approved by the said parties of the first part, the policies of which insurance shall be made payable, in case of loss, to the said parties of the first part, and shall be delivered to and held by them; in case said party of the second part fails to insure said buildings or pay the premiums thereon, the parties of the first part may place said insurance and pay the premiums and add the same to the amount of principal hereof and the same shall be immediately due and payable. In case of a fire destroying all or any portion of said buildings, the insurance money shall be used to replace or repair said buildings.

12. It is further agreed by and between the parties hereto that the parties of the first part may mortgage or convey by deed of trust, the said land

in a sum not to exceed \$15,000, which said encumbrance shall be a lien prior and paramount to any interest therein of the parties of the second part; provided personal notice is given the party of the second part, and that said encumbrance shall not be for a period exceeding the life of this contract, and the said parties of the first part shall pay the interest and principal thereon when due and shall save the party of the second part from loss or embarrassment by reason of said loan and that should the principal due hereunder be [12] reduced to the amount of said loan, then the next payment made on principal shall be as liquidation of said loan.

13. That upon the payment of said principal sum, together with all interest, taxes and obligations herein mentioned and according to the terms of this contract, said parties of the first part will execute and deliver to the party of the second part a grant, bargain and sale deed, conveying all of said real property, free and clear of all encumbrances, except as herein provided to be paid by the party of the second part.

14. The parties of the first part will furnish at the time of the delivery of said deed a complete abstract of title to said property brought down to date, showing merchantable title in the parties of the first part, free of all encumbrances except such as the party of the second part agrees to assume and pay.

15. That in the event said party of the second part fails to pay any of the assessments, insurance

premiums, liens or encumbrances on or affecting said property when due, the parties of the first part retain the privilege of paying the same and upon doing so, said amount or amounts so paid shall thereupon become a part of the principal and shall bear a like interest and be immediately due and payable.

16. That in the event said party of the second part fails to perform any of the terms and conditions of this agreement, or shall make default in any payment of principal or interest, then all of the rights of the party of the second part hereto shall terminate and all payments theretofore made shall be retained by the said parties of the first part and treated as compensation for the rental and occupancy of the said land up to the time of such default.

17. That time is and shall be the essence of this contract.

IN WITNESS WHEREOF, the parties hereto have hereunto [13] set their hands and seals the day and year herein first above written.

CHAS. E. WARREN.

MABEL D. WARREN.

F. GENN BROMLEY.

The following is a list of the personal property mentioned in the foregoing contract:

1 double P. & O. 11-inch plow.

1 spring-tooth cultivator (2 sections).

1 orchard truck (goose-neck).

1 ten-foot harrow.

1 set work harness.

- 1 spring-wagon used as trailer.
- 8 tons of barley hay.
- 1 bean tractor.
- 300 boxes.
- 1500 tree props, more or less.
- 1 two-h. p. electric motor.
- 260 feet 10-inch steel riveted pipe.
- 1 45-foot 8-inch belt.
- 1 power wood saw.
- 1 Oliver 8-inch single plow.
- 1 single cultivator.
- 1 two-horse wagon (low wheel).
- 1 gray mare.
- 1 bay mare.
- 1 cow.
- 2 tons cow hay.
- 10 fruit ladders.
- 800 trays, more or less.
- 1 dry fruit grader.
- 1 twenty h. p. electric motor.
- 1 No. 5 Krogh pump.
- 1 dipping plant.

State of California,

County of Santa Clara,—ss.

On this 4th day of December, in the year one thousand nine hundred and nineteen, before me, M. E. Empey, a notary public in and for the said county of Santa Clara, residing therein, duly commissioned and sworn, personally appeared Chas. E. Warren, Mabel D. Warren, his wife, and F. Genn Bromley, known to me to be the persons whose names are subscribed to the within instrument and

acknowledged to me that they executed the same.
[14]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City of San Jose, County of Santa Clara, the day and year in this certificate first above written.

[Seal]

M. E. EMPEY,

Notary Public in and for the County of Santa Clara,
State of California.

[Endorsed]: Filed Jun. 27, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

(Title of Court and Cause.)

Summons.

Action brought in said District Court, and the complaint filed in the office of the Clerk of said District Court, in the City and County of San Francisco.

ARTHUR H. BARENDT,

Plaintiff's Attorney.

The President of the United States of America,
GREETING: To Charles E. Warren and
Mabel D. Warren, Defendants.

YOU ARE HEREBY DIRECTED TO APPEAR, and answer the complaint in an action entitled as above, brought against you in the Southern Division of the United States District Court for the Northern District of California, Second Divi-

sion, within ten days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any moneys or damages demanded in the complaint, as arising upon contract, or he will apply to the Court for any other relief demanded in the complaint.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 27th day of June in the year of our Lord one thousand nine hundred and twenty-one, and of our Independence the one hundred and forty-fifth.

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk. [16]

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the 27th day of June, 1921, and personally served the same on the 27th day of June, 1921, upon the therein named Charles E. Warren and Mabel D. Warren, by delivering to, and leaving with Charles E. Warren and Mabel D. Warren, each of the said defendants named therein personally at 2 miles northeast of the town of Cupertino, County of Santa Clara, in said District, an attested copy thereof,

together with a copy of the complaint, attached thereto.

J. B. HOLOHAN,
U. S. Marshal.
By I. W. Grover,
Office Deputy.

San Francisco, June 28th, 1921.

[Endorsed]: Filed Jun. 28, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

(Title of Court and Cause.)

Notice of Motion to Strike Out, etc.

To the Above-named Plaintiff and to His Attorney,
Arthur H. Barendt:

NOTICE IS HEREBY GIVEN YOU, and each of you, that the above-named defendants will move the above-entitled court at its courtroom in the United States Post Office Building in the City and County of San Francisco, State of California, on Monday, the 22d day of August, 1921, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, for an order to strike from the complaint of the plaintiff on file herein the following portions thereof, and each of them, to wit:

I.

From page two, that portion thereof commencing with line fifteen, and reading as follows, to wit: "that payment of interest and the balance of the principal under said contract, it was expressly provided, should be made by the defendants retaining title to sixty per cent (60%) of the crop grown on

the orchard each year during the life of the contract, and that as said crop was disposed of annually the defendants should receive sixty per cent (60%) of the proceeds of said crop, which proceeds, as stated in said contract, were to be credited by them to unpaid interest and balance of the principal due them from plaintiff under said contract."

II.

From page three, that portion thereof commencing with line fifteen, and reading as follows, to wit: "and plaintiff invested the sum of \$4,000 or thereabouts in the purchase of tools, machinery and implements necessary to the proper farming of said fruit ranch and all of said tools, machinery and implements were delivered to, and used in, the cultivation of said orchard." [18]

SAID MOTION WILL BE MADE upon the ground that said portions of said complaint are, and each of them is:

- a. Surplusage.
- b. Redundant.
- c. The allegations of immaterial matter.

SAID MOTION WILL BE to strike out each of said portions separately and upon each of said grounds separately.

SAID MOTION WILL BE BASED upon this notice of motion and the complaint in said action.

EDWIN A. WILCOX,
FRY & JENKINS,

Attorneys for Defendants. [19]

State of California,
County of Santa Clara,—ss.

M. T. Gross, being first duly sworn, deposes and says: That she is and at all times hereinafter mentioned has been a citizen of the United States, over the age of twenty-one years; that on the 9th day of August, 1921, she personally served the above and foregoing notice of motion upon Arthur H. Barendt, the attorney for the plaintiff, by then and there depositing in the United States Post-office in the City of San Jose, County of Santa Clara, State of California, a copy of said notice of motion, inclosed in a sealed envelope plainly addressed to the said Arthur H. Barendt at his office at Mills Building, San Francisco, Cal., and on which the postage has been prepaid in full; that at all the times herein mentioned the attorneys for defendants had their offices in the City of San Jose aforesaid and the attorney for plaintiff had his offices at San Francisco, Calif., aforesaid, and there is, and was, a daily communication by mail between the said cities and towns; that the distance between the said place of deposit and the place of service is less than 50 miles.

M. T. GROSS.

Subscribed and sworn to before me this 9th day of August, 1921.

[Seal] DESMOND T. JENKENS,
Notary Public in and for the County of Santa
Clara, State of California.

[Endorsed]: Filed Aug. 16, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

(Title of Court and Cause.)

Demurrer.

Comes now the defendants and demur to the complaint of the plaintiff herein and for cause of demurrer allege:

I.

That the first alleged cause of action in said complaint stated does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

II.

That the second alleged cause of action in said complaint stated does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

III.

That the said first alleged cause of action in said complaint stated is uncertain is this, that it does not appear therein, nor can it be ascertained therefrom:

a. In what the rehabilitation of said orchard consisted in which plaintiff expended the sum of Three Thousand Eight Hundred and Twenty-five Dollars (\$3,825).

b. How or in what manner the plaintiff was damaged by investing the sum of Four Thousand Dollars (\$4,000), or thereabouts, in the purchase of tools, machinery and implements necessary to the

proper farming of said fruit ranch mentioned in the complaint.

c. Whether or not the plaintiff in irrigating said acreage to the utmost capacity of the water actually available claims to have done more than was required of him to be done by the contract marked Exhibit "A" and attached to the complaint.

d. Whether or not plaintiff interprets said contract as meaning that the payment of the interest and the balance of the purchase price under said contract was to be paid solely out of the sixty per cent (60%) of the crop grown on the orchard [21] each year during the life of the contract.

e. When plaintiff delivered to the California Prune & Apricot Growers, Inc., the prunes alleged in said complaint to have been delivered to it.

f. When the plaintiff delivered to the California Co-operative Canneries the pears and peaches alleged to have been delivered by him to it.

g. What sum the defendants have received from the California Co-operative Canneries for the fruit delivered to it by plaintiff.

IV.

That the said first alleged cause of action in said complaint stated is ambiguous for the reasons, and each of them, that it is herein alleged to be uncertain.

V.

That the said first alleged cause of action is said complaint stated is unintelligible for the reasons, and each of them, that it is herein alleged to be uncertain.

VI.

That the second alleged cause of action in said complaint stated is uncertain in this: that it does not appear therein, nor can it be ascertained therefrom:

a. When or where defendants wrongfully and unlawfully, or wrongfully or unlawfully, or at all, converted to their own use the personal property set forth therein.

b. Whether or not any portion of the property set forth in Paragraph Two of said alleged second cause of action is the personal property described in the list attached to Exhibit "A" and made a part of said complaint.

VII.

That said second alleged cause of action is unintelligible for the reasons, and each of them, that it is hereinbefore alleged to be uncertain. [22]

VIII.

That said second alleged cause of action in said complaint stated is ambiguous for the reasons, and each of them, that it is hereinabove alleged to be uncertain.

IX.

That several causes of action have been improperly united in this: that a cause of action for breach of contract and damages therefor has been improperly united with a cause of action for the conversion of personal property.

X.

That several causes of action have been improperly united and not separately stated in said second

alleged cause of action in this: that a cause of action for breach of contract and damages has been joined and stated with a cause of action for the conversion of personal property.

WHEREFORE defendants pray that plaintiff take nothing and that they be hence dismissed with their costs.

EDWIN A. WILCOX,
FRY & JENKINS,
Attorneys for Defendants. [23]

State of California,
County of Santa Clara,—ss.

M. T. Gross, being first duly sworn, deposes and says: That she is and at all times hereinafter mentioned has been a citizen of the United States over the age of twenty-one years; that on the 9th day of August, 1921, she personally served the above and foregoing demurrer upon Arthur H. Barendt, the attorney for the plaintiff, by then and there depositing in the United States Postoffice in the city of San Jose, county of Santa Clara, State of California, a copy of said demurrer inclosed in a sealed envelope plainly addressed to the said Arthur H. Barendt at his office at Mills Building, San Francisco, Cal., and on which the postage had been prepaid in full; that at all the times herein mentioned the attorneys for defendants had their offices in the city of San Jose aforesaid and the attorney for plaintiff had his offices at San Francisco, Calif., aforesaid, and there is, and was, a daily communication by mail between the said cities and towns; that

the distance between the said place of deposit and the place of service is less than 50 miles.

M. T. GROSS.

Subscribed and sworn to before me this 9th day of August, 1921.

[Seal] DESMOND T. JENKINS,
Notary Public in and for the County of Santa Clara, State of California.

[Endorsed]: Filed Aug. 16, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [24]

(Title of Court and Cause.)

Amended Demurrer.

Come now the defendants and demur to the complaint of the plaintiff herein and for cause of demurrer allege:

I.

That the first alleged cause of action in said complaint stated does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

II.

That the second alleged cause of action in said complaint stated does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

III.

That the said first alleged cause of action in said complaint stated is uncertain in this: that it does

not appear therein, nor can it be ascertained therefrom:

a. In what the rehabilitation of said orchard consisted in which plaintiff expended the sum of Three Thousand Eight Hundred Twenty-five Dollars (\$3,825).

b. In what amount the value of said property was enhanced by the expenditure on the part of the plaintiff of the said sum of Three Thousand Eight Hundred Twenty-five Dollars (\$3,825).

c. In what amount or sum the plaintiff has increased the value of said acreage during his tenure thereof by reason of his care in cultivating, and labor bestowed upon the land and trees of said property.

d. How or in what manner the plaintiff was damaged by investing the sum of Four Thousand Dollars (\$4,000) or thereabouts in the purchase of tools, machinery and implements necessary to the proper farming of said fruit ranch mentioned in the complaint. [25]

e. What, if anything, was the reasonable value of the use and occupancy of the premises described in the complaint during the period that it was occupied by plaintiff.

f. What was the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the purchase thereof alleged in the complaint.

g. Whether or not the plaintiff ever offered to, or did, restore to defendants or either of them

everything or anything of value received by him under said contract.

h. Whether or not the personal property on said ranch alleged to have been taken possession of by defendants is any part of the tools, machinery and implements alleged to have been purchased by the plaintiff for the sum of Four Thousand Dollars (\$4,000) or thereabouts.

i. Whether or not the plaintiff ever, on or before the first day of December, 1920, offered to pay to defendants or either of them the balance of the interest due on the first day of December, 1920, under the contract of purchase set forth in the complaint.

j. Whether or not plaintiff interprets said contract as meaning that the payment of the interest and the balance of the purchase price under said contract was to be paid solely out of the Sixty Per Cent (60%) of the crop grown on the orchard each year during the life of the contract.

k. When plaintiff delivered to the California Prune & Apricot Growers, Inc., the prunes alleged in said complaint to have been delivered to it.

l. When the plaintiff delivered to the California Co-operative Canneries the pears and peaches alleged to have been delivered by him to it.

m. What sum the defendants have received from California Co-operative Canneries for the fruit delivered to it by plaintiff. [26]

n. When the balance alleged to be due from the California Prune & Apricot Growers, Inc., for fruit delivered to it, as alleged in the complaint, is due or payable to the defendants.

IV.

That the said first alleged cause of action in said complaint stated is ambiguous for the reasons, and each of them, that it is herein alleged to be uncertain.

V.

That the said first alleged cause of action in said complaint stated is unintelligible for the reasons, and each of them, that it is herein alleged to be uncertain.

VI.

That several causes of action have been improperly united in said first cause of action in this: That a cause of action for breach of contract and damages therefor has been improperly united with a cause of action based upon a rescission of the same contract.

VII.

That several causes of action have been improperly united and not separately stated in said action in this: This a cause of action for breach of contract and damages therefor has been improperly united with a cause of action based upon a rescission of the same contract.

VIII.

That the second alleged cause of action in said complaint stated is uncertain in this: that it does not appear therein, nor can it be ascertained therefrom:

a. Whether or not any portion of the property set forth in Paragraph Two of said alleged Second Cause of Action is the personal property described

in the list attached to Exhibit "A" and made a part of said complaint.

b. Whether or not any portion of the property set forth in [27] Paragraph Two of said alleged second cause of action is any portion of the tools, machinery and implements alleged to have been paid for by plaintiff for Four Thousand Dollars (\$4,000).

IX.

That said second alleged cause of action is unintelligible for the reasons, and each of them, that it is hereinbefore alleged to be uncertain.

X.

That said second alleged cause of action in said complaint stated is ambiguous for the reasons, and each of them, that it is hereinbefore alleged to be uncertain.

XI.

That several causes of action have been improperly united in said second cause of action in this: that a cause of action for breach of contract and damages therefor has been improperly united with a cause of action for the conversion of personal property.

XII.

That several causes of action have been improperly united and not separately stated in said second alleged cause of action in this: that a cause of action for breach of contract and damages has been joined and stated with a cause of action for the conversion of personal property.

WHEREFORE defendants pray that plaintiff take nothing and that they be hence dismissed with their costs.

EDWIN A WILCOX,
FRY & JENKINS,
Attorneys for Defendants.

Received a copy of the amended demurrer this 17th day of August, 1921.

ARTHUR H. BARENDT,
Attorney for Plaintiff. [28]

[Endorsed]: Filed Aug. 17, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [29]

(Title of Court and Cause.)

Amended Notice of Motion to Strike Out, etc.

To the Above-named Plaintiff and to His Attorney,
Arthur H. Barendt:

NOTICE IS HEREBY GIVEN YOU, and each of you, that the above-named defendants will move the above-entitled court at its courtroom in the United States Postoffice Building in the City and County of San Francisco, State of California, on Monday, the 22d day of August, 1921, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, for an order to strike from the complaint of the plaintiff on file herein the following portions thereof, and each of them, to wit:

I.

From page two, that portion thereof commencing with line fifteen, and reading as follows, to wit:

“that payment of interest and the balance of the principal under said contract, it was expressly provided, should be made by the defendants retaining title to sixty per cent (60%) of the crop grown on the orchard each year during the life of the contract, and that as said crop was disposed of annually the defendants should receive sixty per cent (60%) of the proceeds of said crop, which proceeds, as stated in said contract, were to be credited by them to unpaid interest and balance of the principal due them from plaintiff under said contract.”

II.

From page three, that portion commencing with line eleven, and reading as follows, to wit: “and it was necessary to expend large sums of money in its rehabilitation and plaintiff has expended a sum exceeding \$3,825.00 in the rehabilitation [30] of said orchard in so much that the value of said property has been greatly enhanced.”

III.

From page three, that portion thereof commencing with line fifteen, and reading as follows, to wit: “and plaintiff invested the sum of \$4,000 or thereabouts in the purchase of tools, machinery and implements necessary to the proper farming of said fruit ranch and all of said tools, machinery and implements were delivered to, and used in, the cultivation of said orchard.”

IV.

From page three, that portion thereof commencing with line twenty, and reading as follows, to wit: “That the year 1920 was one of exceptional

drouth and was the fourth successive dry year in the said County of Santa Clara, and there was neither rainfall nor water available for the adequate irrigation of said ranch, nevertheless plaintiff irrigated said acreage to the utmost capacity of the water actually available and by reason of the care in cultivating and the labor bestowed upon the land and trees on said property, plaintiff succeeded in raising crops and equal of any produced on any similarly situated land devoted to the cultivation of like fruits; and plaintiff has thereby increased the value of said acreage during his tenure thereof."

V.

From page five, that portion thereof commencing with line eighteen and reading as follows, to wit: "That it was provided and agreed by the terms of said contract that payment of the unpaid interest should be made by defendants by crediting the plaintiff on account of the unpaid interest, the said sixty per cent of said crops when disposed of, by defendants to the said unpaid interest and said balance of said purchase price, and by adding to the said principal any unpaid interest at the time of the sale and disposal of said sixty per cent of said crops, and [31] that said unpaid interest should also bear interest at the rate of six per cent per annum in the same manner as the unpaid balance of said principal."

VI.

From page seven, that portion thereof commencing with line one, and reading as follows: "the

said sum of \$6,000, paid to defendants under said contract on December 1, 1919."

VII.

From page seven, that portion thereof commencing with line two, and reading as follows, to wit: "the sum of \$3,525 paid, laid out and expended by plaintiff for help in the farming of said property and for the value of his own labor thereon."

VIII.

From page seven, that portion thereof commencing with line five and reading as follows, to wit: "\$2,500 which plaintiff alleges to be the enhanced value of said property resulting from the labor and care bestowed thereon by plaintiff."

SAID MOTION WILL BE MADE upon the ground that said portions of said complaint are, and each of them is:

- a. Surplusage.
- b. Redundant.
- c. The allegations of immaterial matter.

SAID MOTION WILL BE to strike out each of said portions separately and upon each of said grounds separately.

SAID MOTION WILL BE BASED upon this amended notice of motion and the complaint in said action.

EDWIN A. WILCOX,
FRY & JENKINS,
Attorneys for Defendants.

Received a copy of the within amended notice of motion this 17th day of August, 1921.

ARTHUR H. BARENDT,
Attorney for Plaintiff. [32]

[Endorsed]: Filed Aug. 17, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [33]

At a stated term, to wit, the July term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 22d day of August, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Title of Cause.)

Minutes of Court—August 22, 1921—Order Overruling Demurrer and Denying Motion to Strike Out Parts, etc.

Defendants' amended demurrer to complaint and amended motion to strike out parts, came on to be heard and after arguments being submitted it was ordered that said demurrer be and the same is hereby overruled and that said motion be and the same is hereby denied. [34]

(Title of Court and Cause.)

**Notice of Overruling Demurrer and Denying
Motion to Strike.**

To the Defendants Above Named, and to Messrs.
Edwin A. Wilcox and Fry & Jenkins, Their
Attorneys:

YOU AND EACH OF YOU will please take
notice that His Honor, Judge William C. Van
Fleet, has overruled the demurrer of the defendants
and has denied their motion to strike, with leave
to answer the complaint of the plaintiff within ten
days next after the service of this notice.

Dated: August 22d, 1921.

ARTHUR H. BARENDT,
Attorney for Plaintiff.

I do hereby certify that I have this day mailed,
postage prepaid, to Messrs. Wilcox, Fry & Jenkins,
attorneys for defendants, a full, true and correct
copy of the within notice of overruling demurrer
and denying motion to strike.

Dated: August 22d, 1921.

ARTHUR H. BARENDT,
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 23, 1921. W. M. Mal-
ling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[35]

(Title of Court and Cause.)

Answer.

Come now the defendants and answering the complaint of the plaintiff on file herein deny, admit and allege as follows, to wit:

I.

Answering the allegations of Paragraph II of the first alleged cause of action in said complaint alleged, defendants deny that payment of said interest and/or of the balance of the principal payable under said contract attached to the complaint and marked Exhibit "A," it was expressly, or at all, provided in said contract should be made by the defendants, or either of them, retaining title to sixty per cent (60%), or any, per cent of the crop grown on said orchard each, or any, year during the life of the contract, and/or that as said, or any, crop was disposed of annually, or shall, the defendants, or either of them, should receive sixty (60%) or any, per cent, of the proceeds of said, or any, crop, or which proceeds as stated in said contract, or at all, were to be credited by them to unpaid interest and/or the balance of the principal due them from plaintiff under said contract, and defendants allege that payment of said interest and of the said balance of the principal payable was to be made in the manner and at the times specified in said Exhibit "A" and not otherwise;

II.

Answering the allegations of Paragraph III of

said alleged first cause of action, defendants deny that the plaintiff, after his entry into possession and/or occupation of said acreage, or at any time or at all, commenced to and/or continued to thereafter, or at all, or did, during the entire, or any part [36] of, the year of 1920, or at any time or at all, farm said land in a first-class, farmer-like and/or orchardist-like manner; deny that plaintiff found said orchard in a much, or any, run down and/or neglected condition, or that said orchard was in a neglected and/or run down condition; deny that it was necessary to expend large, or any sums, or sum, of money, in its rehabilitation and/or that plaintiff has expended a sum exceeding \$3,825.00, or any other sum, or has expended any sum or sums whatsoever in the rehabilitation of said orchard, or that the value of said property has been thereby, or at all, enhanced; defendants allege that they have no information or belief upon the subject sufficient to enable them to answer and on that ground they deny, that plaintiff invested the sum of \$4,000, or thereabouts, or any other sum, in the purchase of tools, machinery, and/or implements necessary to the proper farming of said fruit ranch, or at all, and/or that all, or any, of said tools, machinery and/or implements were delivered to, and/or used in, the cultivation of said orchard.

Defendants deny that there was neither rainfall nor water available for the adequate irrigation of said ranch; deny that plaintiff irrigated said acreage to the utmost capacity of the water actually, or at all, available, and/or by reason of the care

in cultivating and/or the labor bestowed upon the land and/or trees on said property, or at all, plaintiff succeeded in raising crops the equal of any produced on any similarly situated land devoted to the cultivation of like, or any, fruits and/or that plaintiff has thereby, or at all, increased the value of said acreage during his tenure thereof, or at all, and alleges the fact to be that there was rainfall and water available for the adequate irrigation of the whole of said ranch, but that plaintiff failed to irrigate said acreage to the full capacity of said water actually available, and that by reason of plaintiff's [37] said failure to irrigate said acreage to the full capacity of said water actually available, and of his lack of care in cultivating and lack of adequate and properly skilled labor upon the land and trees on said property, plaintiff failed to raise crops the equal of those raised on similarly situated land devoted to the cultivation of like fruits, properly irrigated, cultivated and cared for, and by reason of plaintiff's said failure to properly irrigate and care for said orchard and land in a farmer-like and orchardist-like manner the value of said land was decreased in the sum of \$10,000.

Defendants deny that the balance to be paid to and/or received by defendants, or either of them, from the California Prune & Apricot Growers, Inc., for prunes delivered to it as in the said complaint alleged, or at all, and/or to be by defendants, or either of them, applied to the payment of principal and/or unpaid, or any, interest will be, or is, the sum of \$1,000, or any other sum whatsoever; deny

that there is any balance, or any further payments at all, to be made upon said prunes, either to plaintiff or defendants, or either of them, and allege the fact to be that the California Prune & Apricot Growers, Inc., is a co-operative marketing organization and that all fruit delivered to said California Prune & Apricot Growers, Inc., is paid for from the proceeds received by said California Prune & Apricot Growers, Inc., for the sale of that year's crop, and that the payments made by said organization as in said complaint alleged were advances made upon the amount that said organization estimated said prunes would bring upon sales to be made by it, and that said advances so made are greater than was, or will be, received for said crop of 1920, and, under the rules and regulations of said organization, and under which said prunes were received by it, defendants will be called upon to pay back a portion of said advances, [38] the amount of which defendants are not now advised.

Defendants deny that plaintiff, upon the delivery of said fruit to the California Co-operative Canneries, as in said complaint alleged, or at all, immediately and/or in person or at all, notified said California Co-operative Canneries that sixty (60%) or any, per cent of all, or any, of said, or any, fruit and/or the proceeds of sale thereof belonging to and/or should be credited to defendants, and/or such, or any, credit was immediately, or at all, thereupon, or at all, given by said canneries to said defendants, or either of them; deny that the value of all, or any, of said fruit delivered to said can-

neries was and/or is not less than the sum of Five Thousand Dollars (\$5,000), or any other sum in excess of Eight Hundred Ninety-four and 07/100 Dollars (\$894.07) and/or the said sixty (60%) per cent to be applied by defendants to the balance of said principal and/or unpaid, or any, interest under said contract is the sum of Three Thousand Dollars (\$3,000), or any other sum in excess of Two Hundred Nine and 25/100 Dollars (\$209.25) and defendants allege the fact to be that the said canneries are a co-operative organization for the canning of fruit and marketing of canned fruit, and that all fruit delivered to said canneries is paid out of the profits of that year's operation, and that there became due from said canneries to plaintiff as payment in full for all fruit delivered to it by him, as in said complaint alleged, the sum of Eight Hundred Ninety-four and 07/100 Dollars (\$894.07), and that of this sum there was paid to plaintiff, or for the account of plaintiff, the sum of Six Hundred Eighty-five and 07/100 Dollars (\$685.07), and there was paid to defendants the sum of Two Hundred Nine and 25/100 Dollars (\$209.25), and no more, and that plaintiff failed, refused and neglected to pay sixty (60%) per cent of the proceeds of said fruit to defendants, or either of them. [39]

Defendants deny that all, or any, of said payments on account of said principal and/or unpaid interest as so alleged in the complaint, or at all, made by plaintiff to defendants, or either of them, as provided for and/or agreed upon in said contract, or at all, other than the sum of Two Hundred

Eighty-eight and 69/100 Dollars (\$288.69) from grapes, the sum of One Thousand Five Hundred Sixty-six and 88/100 Dollars (\$1,566.88) from the California Prune & Apricot Growers, Inc., and the sum of Two Hundred Nine and 25/100 Dollars (\$209.25) from the California Co-operative Canneries, were accepted by defendants, or either of them, and defendants allege that said payments were made in installments upon the dates and in the amounts as follows:

Sept. 27, 1920.	From California Prune & Apricot Growers, Inc., for prunes	\$ 414.65
Oct. 12, 1920.	From grapes	110.19
Oct. 21, 1920.	From grapes	178.50
Nov. 6, 1920.	From California Prune & Apricot Growers, Inc., for prunes	444.75
Nov. 13, 1920.	From California Prune & Apricot Growers, Inc., for prunes	707.48
Nov. 30, 1920.	From California Co-op- erative Canneries	209.25
		<hr/> \$2064.82

Defendants allege that said payments were applied as received upon unpaid interest, and were all the payments made by, or for, plaintiff to defendants from the crops sold;

Defendants deny that it was provided and/or agreed by the terms, or any term, of said contract, that payment of the unpaid interest should be

made by defendants, or either of them, by crediting the plaintiff on account of the unpaid interest, the said sixty (60%), or any, per cent of said crops when disposed of, or at all, by defendants, or either of them, to the said, [40] or any, unpaid interest and/or said balance of said, or any, unpaid purchase price, and/or by adding to the said principal any unpaid interest at the time of the sale and/or disposal of said sixty (60%) or any, per cent of said crops, or crop, and/or that said unpaid interest should also bear interest at the rate of six (6%) per cent per annum in the same manner as the unpaid balance of said interest, and deny that said principal and/or unpaid interest was to be paid in any way other than as stated in said Exhibit "A."

III.

Answering the allegations of Paragraph IV of said first cause of action alleged, defendants deny that plaintiff, on or about the 30th day of September, 1920, or at any time, or at all, or ever, placed said ranch property in the temporary, or any, care of a competent foreman, and alleges that the person in whose care plaintiff left said ranch on the 30th day of September, 1920, was a person unskilled in the care of orchards; Deny that during his said absence and/or on or about the 1st day of December, 1920, or at any other time, or at all, the defendants, or either of them, wrongfully and/or unlawfully and/or without the knowledge or consent of plaintiff, entered upon, seized and/or occupied and/or appropriated to their own use all, or any,

of the said land and/or premises and/or all, or any, of the personal property described in said contract, or together with all, or any, of the said personal property placed thereon by plaintiff, and deny that they ever, or at all, took possession of, or appropriated to their own use any of the personal property not mentioned in said contract; admit that on or about the 8th of December, 1920, defendants entered upon and took possession of, all the real property described in said contract, and such portion of the personal property therein described, as was situated on said property at said time, for the reason that plaintiff had breached said contract as in this answer alleged, and that all of the rights of plaintiff thereunder had terminated; defendants [41] deny that they claimed they were, or either of them was, entitled to take over and/or resume possession of all, or any, of the personal property on said ranch, other than the personalty described and mentioned in said contract, or claimed that plaintiff had forfeited all, or any, right, title and/or interest in and/or to the personal property, other than that mentioned and described in said contract, and/or all, or any, of said balance of said sixty (60%) per cent of said, or any, crops then, or at all, unsold; deny that defendants, or either of them, ever since, or at any time prior to December 8th, 1920, have held and/or possessed any portion of the property, real or personal, described in said complaint, and deny that since said time they have held and/or possessed and/or do now retain and/or hold and/or possess, without any legal or other

right, all, or any, of said property, and deny that they hold, or either of them holds, any of said property at all, except that portion mentioned in said contract, and on said real property at the time the same was taken into possession by defendants; deny that defendants ever since, or at all, have held and/or possessed and/or do now, or at all, retain and/or hold and/or possess without any legal or other right, all, or any, of said property; deny that they have, or either of them has, excluded, and/or now do exclude, plaintiff therefrom, except as to that said real property described in said contract, and that portion of the personal property therein described on said real property, on December 8th, 1920; deny that defendants have, or that either of said defendants has, violated and/or broken their contract with plaintiff.

Defendants deny that plaintiff has duly and/or fully, or at all, performed all, or any, of the terms and/or conditions of said contract on his part to be performed.

Defendants allege that plaintiff was in possession of the real property described in said contract from the 1st day of [42] December, 1919, to the 8th day of December, 1920; that during the whole of said period he failed and neglected to farm said premises in a first class, farmer-like and orchardist-like manner; that during the farm and orchard year of 1920, he failed and neglected to plow said orchard at all; that plaintiff failed to double disc more than one half of said orchard; that plaintiff failed and neglected to plow, cultivate or irrigate at all one

and one-half ($1\frac{1}{2}$) acres of said land planted to walnuts and by reason of said failure and neglect all of said trees died; that plaintiff failed and neglected to prune the trees upon said land at the proper time or in the proper manner; that plaintiff failed and neglected to remove all, or any, borers from the roots of the same; that he failed and neglected to remove all, or any, dead trees as soon as customary, or at all, and failed and neglected to replant dead trees; that defendant failed and neglected to irrigate more than one-half ($1\frac{1}{2}$) of said orchard, though there was water available to irrigate the whole thereof, and irrigation was necessary on the whole of said orchard; that plaintiff failed and neglected to eradicate all, or any, rodents from said orchard, and by reason of said failure the gophers girdled during said time seventy-three (73) fruit trees, as a result of which all of said trees died; that he failed and neglected to spray the pear trees as often as is customary, and failed and neglected to spray more than one-half ($1\frac{1}{2}$) the apricot trees at all; that in order for plaintiff to have farmed said ranch in a farmer-like and orchardist-like manner it was necessary that plaintiff should have done and performed each and every act he is alleged to have failed or neglected to do or perform; that plaintiff failed and neglected to pay any of the State and County taxes levied or assessed against said property during the year of 1920; that plaintiff has never paid any portion of the balance of the interest due and payable on the 1st day of December, 1920; That during the last

week in November, 1920, the plaintiff informed the defendants that he had no money with which [43] to pay the balance of the unpaid interest due on December 1st, 1920, or with which to care for or farm said real property, and that he was going to discharge the man hired by him to care for said place, the plaintiff being unable to pay him his wages, and that he then owed him a large sum of money, and that he would not do anything on said ranch until the following February, and that if defendants wanted said ranch cared for they would have to do it themselves; that plaintiff thereupon discharged his said man and said man, in pursuance of his discharge, left said ranch on the 8th day of December; that it was necessary for the proper care of said orchard that a large amount of work should be done there on during the said period between December 8th, 1920, and February 1st, 1921; that because of plaintiff's breaches of said contract and of his failures to properly farm and care for said orchard, and of the facts in this answer alleged, defendants elected to declare all of the rights of the plaintiff under said contract terminated and all payments thereupon made by plaintiff to defendants treated as compensation for the rental and occupancy of the said land by plaintiff up to the 8th day of December, 1920, and took possession of said real property on the 8th day of December, 1920, and of so much of the personal property described in said contract as was then on said premises.

Defendants deny that by said acts and/or conduct, or any of them, of defendants, or either of

them, in said complaint alleged, or at all, and/or by their said, or any, breach of their said, or any, contract, with plaintiff, defendants, or either of them, have caused great, or any, loss and/or damage to plaintiff; deny that plaintiff has been damaged in the sum of Twelve Thousand Twenty-five Dollars (\$12,025), or any sum, or at all; deny that said, or any damages suffered thereby, or at all, by plaintiff are, or is, the said sum of Six Thousand Dollars (\$6,000) paid to defendants under said contract on December 1st, 1919, the sum of [44] Three Thousand Five Hundred Twenty-five Dollars (\$3,525), or any sum, paid, laid out and/or expended by plaintiff for help in the farming of said property; and/or for the value of his own labor thereon and/or Two Thousand Five Hundred Dollars (\$2,500), or any other sum, which is the enhanced value of said property resulting from the labor and/or care bestowed thereon by plaintiff, or at all; allege that they have no information or belief on the subject sufficient to enable them to answer, and upon that ground deny, that the sum of Three Thousand Five Hundred Twenty-five Dollars (\$3,525), or any other sum, was laid out and/or expended by plaintiff for help in the farming of said property, and/or for the value of his own labor thereon; deny that said property was enhanced in value in the sum of Two Thousand Five Hundred Dollars (\$2,500), or any other sum, or at all, from the labor and/or care bestowed thereon by plaintiff, or was at all enhanced in value.

I.

Answering the second alleged cause of action in said complaint stated, defendants refer to, incorporate herein, and make a part hereof, their answer to the said first alleged cause of action.

II.

Defendants deny that defendants, or either of them, on or about December 1st, 1920, wrongfully and/or unlawfully, or at all, took and/or have since held possession of and/or converted to their own use and/or have deprived plaintiff of, the rightful, or any, possession of all, or any, of the following described personal property: [45]

One tractor.

One bean sprayer.

Hay for feed.

Lumber.

One cultivator.

One disc.

300 fruit trays.

150 large boxes.

Chickens.

Cook-stove.

Carpet.

Riding-horse.

Grass rug.

Ice-chest.

Window screens.

Brass curtain rods.

Linoleum.

Trunk and other

personal effects.

Deny that any of said property is of a value greater than that set opposite each item, as follows:

One tractor	\$1,000.00
One bean sprayer	400.00
Hay for feed	62.50
Lumber	15.00
One cultivator	75.00
One disc	75.00
300 fruit trays	216.00
150 large boxes	75.00
Chickens	25.00
Cook-stove	10.00
Carpet	25.00
Riding-horse	25.00
Grass rug	10.00
Ice-chest	15.00
Window screens	1.50
Brass curtain rods	15.00
Linoleum	24.00

Trunk and other personal effects—no value.

Deny that the plaintiff, at the time of the said wrongful, or any, conversion, was the owner and/or entitled to the exclusive or any possession of the said tractor or Bean Sprayer, and allege the fact to be that said implements were sold to plaintiff upon contracts of conditional sale and that each of said articles was retaken by the vendor thereof under said contract because of the failure of the plaintiff to pay for the same according to the terms of said contracts of conditional sale.

Deny that the aggregate, or any value, of said

personal property described in said second cause of action was, or is, any [46] sum in excess of \$2,069.00.

III.

Answering Paragraph II of said alleged second cause of action defendants alleged that they notified plaintiff that all of said personal property on said real property on the 8th day of December, 1920, was then subject to his order and disposal, but the said plaintiff never has given any order for the disposal thereof, nor has he ever informed defendants, or either of them, what he wanted done therewith.

WHEREFORE defendants pray that plaintiff take nothing, and that they have their costs of suit herein.

EDWIN A. WILCOX,
FRY & JENKINS,
Attorneys for Defendants.

State of California,
County of Santa Clara,—ss.

Charles E. Warren, being first duly sworn, deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information or belief, and, as to those matters, he believes it to be true.

CHARLES E. WARREN.

Subscribed and sworn to before me this 31st day of August, 1921.

[Seal] DESMOND T. JENKENS,
Notary Public in and for the County of Santa Clara, State of California. [47]

State of California,
County of Santa Clara,—ss.

M. T. Gross, being first duly sworn, deposes and says: That she is and at all times hereinafter mentioned has been a citizen of the United States over the age of twenty-one years; that on the 31st day of Aug., 1921, she personally served the above and foregoing answer upon Arthur H. Barendt, the attorney for the plaintiff, by then and there depositing in the United States Postoffice in the City of San Jose, County of Santa Clara, State of California, a copy of said answer inclosed in a sealed envelope plainly addressed to the said Arthur H. Barendt, at his office at Mills Building, San Francisco, Cal., and on which the postage had been prepaid in full; that at all the times herein mentioned the attorneys for defendants had their offices in the City of San Jose aforesaid and the attorney for plaintiff had his offices at San Francisco, Calif., aforesaid, and there is, and was, a daily communication by mail between the said cities and towns; that the distance between the said place of deposit and the place of service is less than 50 miles.

M. T. GROSS.

Subscribed and sworn to before me this 31 day of August, 1921.

[Seal] DESMOND T. JENKENS,
Notary Public in and for the County of Santa Clara, State of California.

[Endorsed]: Filed Sep. 3, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [48]

(Title of Court and Cause.)

Stipulation Waiving Jury.

In the above-entitled matter plaintiff having heretofore demanded a jury and having on the 6th day of January, 1922, announced in open court his desire to waive his right to a trial by a jury, and defendants consenting to such waiver; now therefore it is hereby stipulated by and between counsel for the parties plaintiff and defendant that a trial of said cause by a jury be and it is hereby waived.

ARTHUR H. BARENDT,
Attorney for Plaintiff.
EDWIN A. WILCOX,
FRY & JENKINS,
BERT SCHLESINGER,
Attorneys for Defendants.

Dated: January 19, 1922.

Approved: VAN FLEET,
Judge.

The receipt of a copy of the within stipulation waiving jury is hereby admitted this 19th day of January, 1922.

EDWIN A. WILCOX,
FRY & JENKINS,
BERT SCHLESINGER,
Attorneys for Defendants.

[Endorsed]: Filed Jany. 20, 1922. Walter B. Maling, Clerk. [49]

(Title of Court and Cause.)

**Oral Opinion of Hon. Wm. C. Van Fleet, Rendered
Monday, Sept. 11, 1922.**

ARTHUR H. BARENDT, Esq., Attorney for
Plaintiff.

BERT SCHLESINGER, Esq., and E. A. WIL-
COX, Esq., Attorneys for Defendants.

The COURT (Orally).—In the case of Bromley vs. Warren, heretofore tried and submitted, the parties entered into a contract for the sale and purchase of orchard property in Santa Clara Valley. The terms and interpretation of the provisions of the contract were fully discussed and the views of the Court given at the argument and I need not repeat them. The action is brought by the plaintiff, the purchaser, to recover a payment made by him under the contract and the value of certain property upon the place, growing out of the fact that the defendant entered upon the place within the first year, or almost immediately after the termination of the first year, and seized the property with the plaintiff's personalty that was found thereon, on the theory that the plaintiff had breached the contract and the action proceeds upon the theory that the entry of the defendant was a breach of the contract on his part. I am not going to review the evidence but after its careful consideration it is sufficient

for me to say that in my view plaintiff had not failed to perform the contract in any respect but substantially conformed to all its requirements; and that he was entirely within his rights in treating the conduct of the defendant as a breach of the contract by the latter and suing to recover the moneys that had been paid by him upon the contract with the value of the personal property taken [50] by the defendant and also the expenditures by him made in undertaking to carry out the contract. The payment made by the plaintiff was \$6,000 and that he is entitled to recover. I find that the value of the personal property belonging to the plaintiff that was upon the premises when taken over by the defendant to be \$1,800 and I find the amount of money expended by the plaintiff over and above what he received in the way of returns from crops, etc., to be \$1,200 and judgment will be entered in favor of the plaintiff in the total of these sums.

[Endorsed]: Filed Sept. 20, 1922. Walter B. Maling, Clerk. [51]

(Title of Court and Cause.)

Judgment.

This cause having come on regularly for trial upon the 25th day of January, 1922, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed, Arthur H. Barendt, Esq., appearing as attorney for plaintiff and Bert Schlesinger and E. A. Wilcox, Esqrs., appearing as attorneys for defendant;

and the trial having been proceeded with on the 26th and 27th days of January in said year, and oral and documentary evidence upon behalf of the respective parties having been introduced and the evidence having been closed and the cause having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having rendered its oral opinion and ordered that judgment be entered in favor of the plaintiff and against the defendants in the sum of \$9,000.00 and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that F. Genn Bromley, plaintiff, do have and recover of and from Charles E. Warren and Mabel D. Warren, defendants, the sum of nine thousand and no/100 (\$9,000.00) dollars, together with his costs herein expended taxed at \$55.40.

Judgment entered September 11, 1922.

WALTER B. MALING,

Clerk. [52]

(Title of Court and Cause.)

Petition for a New Trial.

Your petitioners, Charles E. Warren and Mabel D. Warren, the defendants in the above-entitled cause, file this their petition for a new trial herein and move the court to grant a new trial in the above-entitled cause and to vacate and set aside the final judgment heretofore made and entered herein in favor of the said plaintiff and against the said de-

fendants and to grant said defendants a new trial of this action upon the following grounds, to wit:

(1) Insufficiency of the evidence to justify the decision and judgment herein.

(2) That said decision and judgment is against law.

(3) Errors in law occurring at the trial and excepted to by the defendants.

That the papers on which this petition for a new trial is to be made are the pleadings and papers on file in the above-entitled action and upon the minutes of the court, and the reporter's transcript of his shorthand notes taken on the trial of said action.

The following is a specification of the particulars wherein the evidence is claimed to be insufficient to justify the decision and judgment rendered herein, viz:

I.

That the evidence indisputably shows that the plaintiff had failed to perform the terms of his contract at the time of the defendants' re-entry, and had not performed at any time, or offered to perform. [53]

(a) That he had failed to farm the orchard in a first-class orchardist-like manner as required by the contract to purchase the orchard in this:

He failed to irrigate the orchard at the proper season of the year, thereby causing a large number of fruit trees to die and to receive insufficient moisture. That he failed to remove dead trees from the orchard and to replant said trees as the contract required him to do.

(b) That he failed to irrigate large portions of the orchard as the contract required.

(c) That he failed to prune the trees in the orchard at the proper season, or at all, causing an almost total failure of crops.

(d) That he failed to exterminate rodents and other pests as far as reasonably possible and in consequence thereof seventy-three of the fruit trees in said orchard died.

(e) That he failed to plow and cultivate the orchard in a first-class manner as required by the contract.

(f) That he failed to pay the taxes against the property as he was required to do under the contract.

(g) That the defendants, in consequence of plaintiff's failure to pay said taxes were compelled to pay the same and the plaintiff never offered to repay the defendants therefor.

(h) That the plaintiff failed to pay the interest on the unpaid purchase price of the orchard as required by the contract; that there was due from the plaintiff to the defendants as interest on December 1, 1920, the sum of Two thousand seven hundred Dollars (\$2,700.00).

(i) That the plaintiff never offered to pay said interest.

(j) The evidence conclusively shows that the plaintiff had abandoned the premises before the re-entry of the defendants.

(k) That the evidence indisputably shows that the employees [54] of the plaintiff on said or-

chard left their employment because plaintiff failed to pay them.

(l) That plaintiff had openly announced that he had given up the orchard.

(m) That he would invest no money of his own in the orchard.

(n) That at the time of the re-entry of defendants the orchard was vacant and such entry was absolutely necessary for the preservation of said orchard.

(o) That at no time did plaintiff offer to return to said premises or to perform his contract with the defendants.

(p) That the evidence indisputably shows that plaintiff frequently announced that he was impecunious and unable to run the orchard.

(q) That the evidence shows that plaintiff told the defendants and other persons that he expected to leave the orchard and to engage in some other occupation, and that he would not take the place back.

(r) The evidence indisputably shows that plaintiff failed *to* refused to perform his contract and he failed to fulfill the stipulations on his part to be kept and performed, and therefore he was not entitled to recover back the moneys he had paid to the defendants on account of the purchase price of the orchard or for improvements made by him on said orchard, or to recover from the said defendants any money whatever.

(s) That the evidence indisputably shows that the said defendants did not breach their contract with plaintiff, and that said defendants had not

caused a great loss and/or damage or any loss or damage to plaintiff in a sum exceeding Twelve thousand and Twenty-five Dollars (\$12,025.00) or in any sum of money whatever or at all.

(t) That there is no evidence to show that the [55] plaintiff had laid out or expended the sum of Three thousand Five hundred and Twenty-five Dollars (\$3,525.00) or any other sum of money in the cultivation of said orchard and including the alleged value of his own labor thereon.

(u) The evidence indisputably shows that said orchard was not enhanced in value in any sum of money whatever resulting from any labor or care bestowed thereon by the plaintiff or any one working for plaintiff.

(v) That the evidence indisputably shows that plaintiff expended no money whatever in the cultivation of the orchard.

(w) The evidence absolutely fails to show that on or about December 1st, 1920, or at any time whatever, or at all, the defendants wrongfully or unlawfully took and have since held possession of or converted to their own use or have deprived plaintiff of the right of possession of any personal property whatever or of anything of value.

The following is a specification of the particular errors of law relied upon:

First: The Court erred in deciding that the defendants had no right to retain the money paid by plaintiff on account of the purchase price of said orchard, cost of improvement or other moneys paid by plaintiff to the defendants as compensation for

the rental and occupation of the said orchard as provided by Section 16 of the contract entered into between the plaintiff and the defendants, which reads as follows:

“That in the event said party of the second part fails to perform *any* of the terms and conditions of this agreement, or shall make default in any payment of principal or interest, then all of the rights of the party of the second part hereto shall terminate and *all payments theretofore made shall be retained by the said parties of the first part and treated as compensation for the rental and occupancy of* [56] *the said land up to the time of such default*”;

as the evidence conclusively shows that plaintiff had failed to perform many of the material conditions of the contract on his part to be kept and performed, namely; that he failed to plow, cultivate, and care for the orchard in a first-class farmer-like way; that he failed to irrigate the orchard at the proper season of the year thus causing a large number of fruit trees therein to die and to receive insufficient moisture; he failed to remove dead trees from the orchard and to replace them with new trees; that he failed to irrigate large portions of the orchard; that he failed to prune the fruit trees in the orchard in the proper season for pruning or at all, thereby causing an almost total failure of fruit crop; that he failed to exterminate rodents and other pests as far as reasonably possible in consequence of which seventy-three fruit trees in said orchard died; he failed to pay the taxes against

the property and the defendants were obligated to do so in order to prevent said property from being sold for taxes; that he failed to repay or offer to repay to the defendants the taxes paid by them as aforesaid; that he failed to pay the interest on the unpaid purchase price of the land; that there was due from plaintiff to the defendants for interest on December 1, 1920, the sum of two thousand seven hundred dollars (\$2,700.00); that he never offered to pay said interest; that he abandoned the premises before the re-entry of the defendants; that the employees of plaintiff on said orchard left their employment because plaintiff failed to pay them; that plaintiff openly announced that he had given up the orchard; that he would advance no money of his own therein; that at no time had plaintiff offered to return to said premises and/or perform his contract. That plaintiff frequently announced that he was impecunious and unable to run and operate the orchard; that he told the defendants and other persons that [57] he expected to leave the premises and engage in some other occupation and that he would not take the orchard back.

Second: That the Court erred in deciding that the following written notice, namely:

“Mr. and Mrs. Chas. E. Warren have requested me to notify you that owing to your failure to perform many of the terms and conditions on your part to be performed in their agreement to sell and your agreement to buy their 51.61 acres of land, part of lots 5 & 6, and part of the northeast quarter of the southeast

quarter of Sec. 10, Township 7, South Range 2 West, M. D. B. & M., Santa Clara County, California, and personally thereon, they have elected to terminate the agreement, and have taken possession of the property. All moneys heretofore paid on the purchase price will be treated as compensation for the rental and occupancy of the land, as provided by Section 16 of the agreement,"

given by the defendants to plaintiff constituted a rescission of the contract for the reason that when said notice was given plaintiff was in default in the particulars hereinbefore specified; that he had abandoned the premises and the notice specifically states that all moneys heretofore paid on the purchase price will be treated as compensation for the rental and occupancy of the land as provided by Section 16 of the Agreement,

"All moneys heretofore paid on the purchase price will be treated as compensation for the rental and occupancy of the land, as provided by Section 16 of the agreement."

Third: That the Court erred in finding that the defendants put an end to the contract and in not finding that the defendants stood squarely on the contract made with the plaintiff.

Fourth: That the Court erred in not finding that the defendants were entitled to retain all moneys paid to them by [58] plaintiff pursuant to provisions of Section 16 of the contract or agreement made between plaintiff and defendants as aforesaid.

Fifth: The Court erred in finding the defend-

ants entered and took possession of the premises without right.

Sixth: The Court erred in finding that there was a failure of consideration on the part of the defendants and that therefore plaintiff was entitled to a judgment against them.

Seventh: That the Court erred in making an entry of judgment herein in favor of the plaintiff and against the defendants.

WHEREFORE said defendants pray that this their petition to vacate and set aside the decision and judgment made and entered herein and to grant defendants a new trial of this action be granted.

Dated: September 14th, 1922.

CHARLES E. WARREN,

MABEL D. WARREN,

Defendants and Petitioners.

EDWIN A. WILCOX,

FRY & JENKINS,

BERT SCHLESINGER,

Attorneys for Defendants and Petitioners.

Receipt of a copy of the within is hereby admitted this 14th day of September, 1922.

ARTHUR H. BARENDT,

Attorney for Plaintiff.

[Endorsed]: Filed Sept. 15, 1922. Walter B. Maling, Clerk. [59]

At a stated term, to wit, the November term, A. D. 1922, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom, in the City and County of San Francisco, on Monday, the 13th day of November, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Title of Cause.)

**Minutes of Court—November 13, 1922—Order
Denying Petition for New Trial.**

Defendants' petition for a new trial, heretofore submitted, being now fully considered and the Court having rendered its oral opinion, it is ordered that said petition for a new trial be and is hereby denied.
[60]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,576.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D. WARREN,

Defendants.

Defendants' Bill of Exceptions.

BE IT REMEMBERED that on the 25th day of January, 1922, at the hour of 10 o'clock A. M., at the courtroom of the above-named court, New Post Office and Court House Building, in the city and county of San Francisco, State of California, the above-entitled cause came on for trial before said court. A trial by jury was waived by the parties hereto. The plaintiff appeared by Arthur H. Barendt, Esq., and the defendants appeared by Edwin A. Wilcox, Esq., Messrs. Fry & Jenkins, and Bert Schlesinger, Esq., whereupon the following proceedings were had and testimony taken, viz:

Mr. SCHLESINGER.—If your Honor please: I wish to tender an amendment to the answer. I will state to your Honor very frankly that I was just called into this case quite recently, and I am not certain whether this matter ought to be allowed, or not.

The action is one to recover damages for alleged breach of contract. The plaintiff claims to have purchased land in Santa Clara County, on a contract of purchase, and that he has complied [61] with the terms of the agreement, and that the defendants have rescinded the contract. He seeks to recover first installment of the purchase price, and for damages claimed to have been for money expended by him in the working of the ranch property.

This controversy is in the same form, this identical cause of action,—in fact, the identical complaint

was filed in the Superior Court of Santa Clara County; a demurrer was filed setting up the ground that the complaint failed to state facts sufficient to constitute a cause of action. The case was heard, and the Court sustained the demurrer, and filed a written opinion. The amendment which I now sets up the fact of the pendency of that suit in Santa Clara County, and the action of the Court in sustaining the demurrer, with leave to amend. The facts, as I understand them, are that after the Court sustained the demurrer and granted to plaintiff five days to amend the complaint, a further extension of ten days was given, and before the extension had expired, the plaintiff voluntarily filed a motion for dismissal without prejudice.

I have examined the authorities, including a case your Honor decided, the case of Wolf vs. District Court, in 235 Fed. 72.

The COURT.—What was the case?

Mr. SCHLESINGER.—It was a case in which a plea of *res adjudicata* was raised, the plaintiff in that case having tried his case in the Superior Court, and he was defeated; then he sought to commence his action anew in this tribunal, and your Honor held he was estopped.

The plaintiff is a British subject. He had the right to originally invoke the jurisdiction of this Court, but he did not do so; he submitted himself to the Superior Court.

The COURT.—He submitted himself to that jurisdiction in this case? [62]

Mr. SCHLESINGER.—Yes; I think both courts had jurisdiction. I would like to suggest this: I would like to file the amendment, with leave to submit to your Honor authorities in support of it.

The COURT.—The regular method is to apply for leave to amend. Your right to amend would have to be passed on first.

Mr. SCHLESINGER.—I have served the amendment on counsel. I am not quite clear whether we are entitled to the amendment. I am relying upon this general doctrine: That counsel having selected his form, and having submitted his differences to that court on the identical action, after having received a rebuff there, the demurrer having been sustained, he cannot commence his case anew here. I wish to proffer here a certified copy of the complaint, a certified copy of the demurrer, a certified copy of the order, and a certified copy of the opinion of the Court. (Tr. pp. 1 to 3.)

The following is a true and correct copy of the complaint, demurrer, order and opinion of the Court: [63]

“In the Superior Court of the State of California,
in and for the County of Santa Clara.

No. 27,113.

Dept. 1.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D. WAR-
REN,

Defendants.

COMPLAINT—DAMAGES—BREACH OF CON-
TRACT—CONVERSION.

Now comes F. Genn Bromley, the plaintiff
in the above-named matter, and complaining of the
defendants, Charles E. Warren and Mabel D. War-
ren, for cause of complaint alleges:

I.

That on the 1st day of December, 1919, plaintiff
and defendants entered into an agreement of pur-
chase and sale of certain acreage devoted mainly to
the raising of fruit, located on the Homestead
Road near Cupertino in the County of Santa Clara,
and certain personalty, located on the said acreage
property; that attached to this complaint and made
a part hereof is a full, true and correct copy of said
contract, containing a description of said acreage
property by metes and bounds and an itemized
statement of said personal property.

Said contract so attached hereto is marked Exhibit "A" and plaintiff pleads said contract in all its terms and conditions as fully as though it were here set forth *in extenso*.

That under the terms of said contract plaintiff was required at the time of the execution thereof to pay, and he did pay, to defendants the sum of Six Thousand (\$6,000) Dollars lawful money of the United States, as a first payment on account of the [64] purchase price of said property in said contract described; that the balance of the purchase price, to wit, the sum of \$45,000, was by the terms of said contract, to be paid on or before five years from the said first day of December, 1919, with interest at the rate of six (6%) per cent per annum payable annually; that payment of interest and the balance of the principal under said contract, and as security therefor, it was expressly provided, should be made by the defendants retaining title to sixty (60%) per cent of the crop grown on the orchard each year during the life of the contract, and that as said crop was disposed of annually, either in open market or through the California Prune and Apricot Growers' Association, the defendants should receive sixty (60%) per cent of the proceeds of said crop to be—as stated in said contract—"by them credited on unpaid interest and the balance on the principal hereof, as herein agreed."

That it was also provided that plaintiff should farm the premises subject matter of the said contract of purchase and sale, in a first class farmer-like and

orchardist-like manner; prune the trees, remove as far as possible all borers from the roots of trees, remove dead trees and replant the same with apricot or prune trees and irrigate the orchard each year when water was available and eradicate all rodents and pests and perform such other duties as are set forth in said contract as to the nature of which reference is hereby made to said Exhibit "A."

II.

That plaintiff entered into the immediate possession and occupation of said acreage property and the whole thereof, and commenced and continued thereafter during the entire year 1920, to farm said land in a first-class farmer-like and orchardist-like manner; that plaintiff found said orchard in a much [65] rundown and neglected condition; and it was necessary to expend large sums of money in its rehabilitation and plaintiff has expended a sum exceeding \$3,825.00 in the rehabilitation of said orchard in so much that the value of said property has been greatly enhanced; and plaintiff invested the sum of \$4,000 or thereabouts in the purchase of tools, machinery and implements necessary to the proper farming of said fruit ranch and all of said tools, machinery and implements were delivered to, and used in the cultivation of, said orchard.

That the year 1920 was one of exceptional drouth and was the fourth successive dry year in the said County of Santa Clara, and there was neither rainfall nor water available for the adequate irrigation of said ranch, nevertheless plaintiff irrigated said acreage to the utmost capacity of the water actu-

ally available and by reason of the care in cultivating and the labor bestowed upon the land and trees on said property, plaintiff succeeded in raising crops the equal of any produced on any similarly situated land devoted to the cultivation of like fruits; and plaintiff has thereby increased the value of said acreage during his tenure thereof.

That in accordance with the terms and conditions of said contract, plaintiff, with the knowledge and consent of defendants, sold all the grapes raised upon said land at a price agreeable to said defendants, and on receipt of the sale price thereof, to wit, on or about the 5th day of November, 1920, paid to them the sum of \$313.10, being sixty (60%) per cent of the said sale price of crop of grapes.

That plaintiff delivered to the California Prune and Apricot Growers' Inc., a total of 32,422 pounds of prunes, said delivery being paid for in installments, to wit, on the 27th day [66] of September, 1920, and the 13th day of November, 1920, and at the express request and order of plaintiff, defendants were credited by said California Prune and Apricot Growers' Inc., with sixty (60%) per cent of the said crop, and said incorporation was instructed to pay and paid on the said last mentioned dates to defendants sixty (60%) per cent of the first payment made by it under deliveries and defendants have received and should have applied to the payment under the contract with plaintiff, the sum of \$1,567.18 in addition to the \$313.10 hereinbefore mentioned; that plaintiff is informed and believes and therefore alleges, that when the said crop of prunes so delivered

to said corporation shall have been paid for in full, defendants will receive a considerable sum, the amount of which plaintiff is unable at this time to estimate further than to allege on his information and belief, that it will be the sum of \$1,000 or thereabouts.

That with the knowledge and consent of defendants, plaintiff delivered to the California Co-operative Canneries from the crops raised by him on said fruit ranch 5545 pounds of pears, 816 pounds of free peaches; 175 pounds of cling peaches and 23,158 pounds of apricots and immediately, and in person, notified said California Co-operative Canneries that sixty (60%) per cent of all of said fruit and the proceeds of sale thereof, should be credited to defendants, and such credit was immediately thereupon given by said canneries to said defendants; that the value of said fruit was and is not less than the sum of \$5,000 or thereabouts and the sixty (60%) per cent credit in favor of defendants is of the value of \$3,000 or thereabouts.

That all of said assignments so made by plaintiff in favor of defendants were accepted by them.

That the total sum which will be realized from the sale [67] of all of said fruit hereinbefore mentioned cannot be stated at this time with more than approximate accuracy; but plaintiff is informed and believes that it will exceed the sum of \$5,000; that there was due defendants for interest under said contract on December 1st, 1920, the sum of \$2,700 and no more, and the sums collected by defendants and the value of the fruit owned by

defendants and credited to them as hereinbefore set forth, was largely in excess of \$2,700; and plaintiff further alleges that but for the labor and skill devoted thereto and the money expended thereon, by him, said ranch would not have yielded crops in such quantity as herein set forth; that at no time prior to December 1st, 1920, was the exact amount ascertainable which should be credited to plaintiff on interest and principal under said contract with defendants, and the exact amount thereof is not yet known either to plaintiff or defendants.

III.

That owing to depressed fruit market conditions in the year 1920 prevailing throughout the County of Santa Clara and elsewhere, which conditions were well known to plaintiff and defendants, no money except as hereinbefore set forth could be realized upon the said crops raised by plaintiff, and plaintiff on or about September 30th, 1920, having placed said ranch property in the temporary care of his foreman, went to San Francisco; that on or about the 9th day of December, 1920, plaintiff was informed that during his said absence and on or about the 1st day of December, 1920, the defendants had entered upon, seized and occupied the house of plaintiff and had appropriated to their own use all the land and all the personal property described in said contract and falsely claimed that plaintiff had broken his contract and that they were entitled to take over and had resumed possession of said [68] real property and all the personalty on said ranch, and that plaintiff had forfeited all right, title and

interest in and to said property and the whole thereof, including the sum of \$6,000 in cash paid by plaintiff to defendants on December 1st, 1919, as hereinbefore set forth; together with all moneys received from the sale of fruit and all moneys to be realized hereafter from the sale of fruit regularly assigned to them by plaintiff as hereinbefore set forth, and defendants ever since have and do now retain and hold without right, all of said property.

That plaintiff has fully performed all the terms and conditions of said contract devolving upon him to perform thereunder.

That the defendants have wrongfully breached said contract to the great loss and damage of plaintiff, and plaintiff alleges that his damage is not less in the aggregate than the sum of \$12,025; which sum is estimated by plaintiff as follows:

Six thousand dollars paid to defendants under said contract on December 1st, 1919; \$3,525 for the labor of plaintiff and his help in the farming of said property, and \$2,500 for the enhancement in value of said property due to the labor and care bestowed thereon by plaintiff.

V.

That defendants are husband and wife and in all matters pertaining to said contract immediately subsequent to the execution thereof by defendants, the defendant Charles E. Warren has acted in his own behalf and for and in behalf of his wife and codefendant, Mabel D. Warren.

And as a further, separate and distinct cause of

action, plaintiff complains of defendants and alleges: [69]

I.

Plaintiff here repeats and pleads as fully as though here set forth, all the allegations set forth in the several paragraphs of the first cause of action and further alleges:

II.

That defendants have wrongfully and unlawfully converted to their own use and have deprived plaintiff of the rightful possession of the following personal property of the value herein set forth:

One tractor of the value of	\$1575.00
One bean sprayer of the value of.....	530.00
Hay for feed of the value of	179.63
Lumber of the value of	56.75
One cultivator of the value of	150.00
One disc of the value of	190.00
300 fruit trays of the value of	300.00
150 large boxes of the value of	100.00
Chickens of the value of	100.00
Cook-stove of the value of	20.00
Carpet of the value of	150.00
Riding-horse of the value of	100.00
Grass rug of the value of	27.00
Ice-chest of the value of	30.00
Window screens of the value of	10.00
Brass curtain rods of the value of	15.00
Linoleum of the value of	38.00
Trunk and other personal effects of the value of	200.00

That plaintiff at the time of said wrongful conversion was the owner and entitled to the possession of all of said personal property, and the aggregate value thereof was and is the sum of \$3,771.38 or thereabouts.

III.

That demand has been made upon defendants for the return of said personal property; but said property has not, nor has any portion thereof, been returned to plaintiff.

WHEREFORE PLAINTIFF PRAYS judgment against defendants:

(a) For the sum of \$6,000, money paid on account of the purchase price of the property in this complaint described. [70]

(b) For the sum of \$6,025, for moneys laid out and expended in the cultivation of said ranch and for tools, implements and machinery; and the enhancement in value of said ranch due to the care and labor bestowed thereon by plaintiff.

(c) For such further sum as the Court may find plaintiff is entitled to recover for breach of contract by defendants.

(d) For the return of all the property wrongfully converted to their own use by defendants, or for its value in the sum of \$3,771.38.

(e) For costs of suit.

(f) For such other and further relief as may be meet in the premises.

ARTHUR H. BARENDT,
Attorney for Plaintiff.

State of California,
City and County of San Francisco,—ss.

F. Genn Bromley, being first duly sworn, deposes and says: That he is the plaintiff in the foregoing complaint named; that he has read said complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on his information and belief and as to them he believes it to be true.

F. GENN BROMLEY.

Subscribed and sworn to before me, this 22d day of March, 1921.

[Seal]

JAMES McCUE.

Notary Public in and for the City and County of
San Francisco, State of California. [71]

EXHIBIT "A."

THIS AGREEMENT, made and entered into this first day of December, A. D. 1919, by and between Chas. E. Warren and Mabel D. Warren, his wife, the parties of the first part and F. Genn Bromley, the party of the second part;

WITNESSETH: That the said parties of the first part hereby agree to sell to the said party of the second part, and the said party of the second part agrees to buy and pay for on the terms and conditions and subject to the reservations herein provided all of the following described property situate, lying and being in the County of Santa Clara, State of California, and particularly described as follows, to wit:

BEGINNING at a point on the South line of the Homestead Road, formerly known as the Emerson or Young Road, which point is West 5 rods from the Section line between sections 10 and 11, Township Seven (7) South Range 2 West, and is the Northwest corner of the land now or formerly owned by Henrietta Krieg (the late widow of Jacob Smith, deceased) and formerly owned by E. Harrison; thence South along the West line of said lands of Krieg, to the Southwest corner of lands owned by said Krieg; thence at right angles Westerly to the center line of the Cupertino Creek; thence Northerly down said Creek following its meanderings and the center line thereof to the South line of the Homestead, Emerson or Young Road; thence Easterly and along said South side of said Road to the place of beginning; containing 55.55 acres of land, more or less, and being parts of Lots 5 and 6 and part of the Northeast quarter of the Southeast quarter of Section 10, Township 7 South Range 2 West, M. D. B. and M. Saving and except that portion thereof containing 3.94 acres of land, more or less conveyed by said Pedro M. Lusson to the San Jose-Los Gatos Interurban Railway Company, by deed dated January 16, 1905, and recorded January 27, 1905, in the office of said County Recorder in Volume 289 of Deeds, at page 49, Records of Santa Clara, California.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, including all water rights.

Also the personal property on said real property, a list of which is hereby attached and made a part hereof. [72]

2. That the full purchase price for said property to be paid by the said party of the second part to the parties of the first part shall be the sum of Fifty-one Thousand (\$51,000) Dollars, lawful money of the United States, of which the sum of Six Thousand (\$6,000) Dollars is to be paid upon the execution and delivery of this agreement, the receipt whereof is hereby acknowledged.

3. The balance of said purchase price, to wit: the sum of Forty-five Thousand (\$45,000) Dollars shall be paid in lawful money of the United States of America on or before five years from this date, together with interest thereon from date until paid at the rate of six per cent net per annum, payable annually, and if not paid as it becomes due, it shall be added to the principal, and become a part thereof and thereafter bear interest at the same rate.

4. It is understood and agreed that the party of the second part will take immediate possession of said premises and during the life of this contract, he shall farm said premises in a first-class farmer-like and orchardist-like manner; that he will prune said trees at the proper time each year and so far as is possible remove all borers from the roots of the same; that he will remove all dead trees and as

soon as customary thereafter, replant the same with apricot or prune trees. That he will irrigate the orchard each year when the water is available; he will eradicate all rodents and other pests so far as it is reasonably possible and spray the pear trees each year as often as it is customary so to do.

5. That the party of the second part will pick and gather said fruit when ripe and shall market the same in a first-class manner in accordance with the usual custom of orchardists in Santa Clara Valley. [73]

6. That the parties hereto agreed that the title to sixty (60%) per cent of the crop grown on said orchard each year hereafter during the life of this contract shall remain in the parties of the first part until the same is sold and the proceeds disposed of in the manner provided for in this contract.

7. It is understood and agreed that when said crop is ready for the market, the party of the second part will notify the parties of the first part that he is ready to sell and state the price at which he is willing to sell, and if said price is the market price for the fruit at that time, the parties hereto agree to consent to the sale of said fruit and shall thereupon sell said fruit in the joint names of the parties of the first part and the party of the second part in the proportion of 60% in the name of the parties of the first part and 40% in the name of the party of the second part, and the portion which shall go to the parties of the first part shall be by

them credited on unpaid interest and the balance on the principal hereof, as herein agreed.

8. It is understood and agreed that if said fruit is turned into the California Prune and Apricot Growers Association, it shall be received and paid for in the same proportion and for the same purposes as herein agreed.

9. It is understood and agreed that the parties of the first part may at any time enter upon said premises and inspect the same and that the said party of the second part will keep all fences, buildings, trays and boxes now on said premises in good repair.

10. The party of the second part agrees to pay all taxes and assessments of whatever description which shall be hereafter assessed against said property until the payment of the full purchase price herein agreed to be paid. [74]

11. The party of the second part shall keep all buildings which are now on, or which may be hereafter erected on said premises, and the trays and boxes insured against loss or damage by fire, to the amount of at least \$5,000.00 in some insurance company or companies to be approved by the said parties of the first part, the policies of which insurance shall be made payable, in case of loss, to the said parties of the first part, and shall be delivered to and held by them; in case said party of the second part fails to insure said buildings or pay the premiums thereon, the parties of the first part may place said insurance and pay the premiums and add the same to the amount of princi-

pal hereof and the same shall be immediately due and payable. In case of a fire destroying all or any portion of said buildings, the insurance money shall be used to replace or repair said buildings.

12. It is further agreed by and between the parties hereto that the parties of the first part may mortgage or convey by deed of trust, the said land in a sum not to exceed \$15,000, which said encumbrance shall be a lien prior and paramount to any interest therein of the parties of the second part; provided personal notice is given the party of the second part, and that said encumbrance shall not be for a period exceeding the life of this contract, and the said parties of the first part shall pay the interest and principal thereon when due and shall save the party of the second part from loss or embarrassment by reason of said loan and that should the principal due hereunder be reduced to the amount of said loan, then the next payment made on principal shall be as liquidation of said loan.

13. That upon the payment of said principal sum, together with all interest, taxes and obligations herein mentioned and according to the terms of this contract, said parties of the [75] first part will execute and deliver to the party of the second part a grant, bargain and sale deed, conveying all of said real property, free and clear of all encumbrances, except as herein provided to be paid by the party of the second part.

14. The parties of the first part will furnish at the time of the delivery of said deed a complete abstract of title to said property brought down to

date, showing merchantable title in the parties of the first part, free of all encumbrances except such as the party of the second part agrees to assume and pay.

15. That in the event said party of the second part fails to pay any of the assessments, insurance premiums, liens or encumbrances on or affecting said property when due, the parties of the first part retain the privilege of paying the same and upon doing so, said amount or amounts so paid shall thereupon become a part of the principal and shall bear a like interest and be immediately due and payable.

16. That in the event said party of the second part fails to perform any of the terms and conditions of this agreement, or shall make default in any payment of principal or interest, then all of the rights of the party of the second part hereto shall terminate and all payments theretofore made shall be retained by the said parties of the first part and treated as compensation for the rental and occupancy of the said land up to the time of such default.

17. That time is and shall be the essence of this contract.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year herein first above written.

CHAS. E. WARREN.

MABEL D. WARREN.

F. GENN BROMLEY. [76]

The following is a list of the personal property mentioned in the foregoing contract:

- 1 double P. & O. 11-inch plow.
- 1 spring-tooth cultivator—(2 sections).
- 1 orchard truck (goose-neck).
- 1 ten-foot harrow.
- 1 set work harness.
- 1 spring-wagon used as trailer.
- 8 tons of barley hay.
- 1 bean tractor.
- 300 boxes.
- 1500 tree props, more or less.
- 1 two-h. p. electric motor.
- 260 feet 10-inch steel riveted pipe.
- 1 45-foot 8-inch belt.
- 1 power wood saw.
- 1 Oliver 8-inch single plow.
- 1 single cultivator.
- 1 two-horse wagon (low wheel).
- 1 grey mare.
- 1 bay mare.
- 1 cow.
- 2 tons cow hay.
- 10 fruit ladders.
- 800 trays, more or less.
- 1 dry fruit grader.
- 1 twenty h. p. electric motor.
- 1 No. 5 Krogh pump.
- 1 dipping plant.

State of California,
County of Santa Clara,—ss.

On this 4th day of December, in the year one thousand nine hundred and nineteen, before me, M. E. Empey, a notary public in and for the said County of Santa Clara, residing therein, duly commissioned and sworn, personally appeared Chas. E. Warren, Mabel D. Warren his wife and F. Genn Bromley, known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City of San Jose, County of Santa Clara, the day and year in this certificate first above written.

M. E. EMPEY,
Notary Public in and for the County of Santa
Clara, State of California. [77]

In the Superior Court of the State of California
in and for the County of Santa Clara.

No. 27113.

Dept. 1.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D.
WARREN,

Defendants.

DEMURRER.

Come now the defendants and demur to the complaint of the plaintiff on file herein and for cause of demurrer allege:

I.

That the first alleged cause of action in said complaint stated does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

II.

That the second alleged cause of action in said complaint stated does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

III.

That the said first alleged cause of action in said complaint stated is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom:

a. In what the rehabilitation of said orchard consisted in which plaintiff expended the sum of Three Thousand Eight Hundred Twenty-five (3825) Dollars.

b. How or in what manner the plaintiff was damaged by investing the sum of Four Thousand (4000) Dollars, or thereabouts, in the purchase of tools, machinery and implements necessary to the proper farming of said fruit ranch mentioned in the complaint. [78]

c. Whether or not the plaintiff in irrigating said acreage to the utmost capacity of the water

actually available claims to have done more than was required of him to be done by the contract marked Exhibit "A" and attached to the complaint.

d. Whether or not plaintiff interprets said contract as meaning that the payment of the interest and the balance of the purchase price under said contract was to be paid solely out of the sixty per cent (60%) of the crop grown on the orchard each year during the life of the contract.

e. When plaintiff delivered to the California Prune & Apricot Growers, Inc., the prunes alleged in said complaint to have been delivered to it.

f. When the plaintiff delivered to the California Co-operative Canneries the pears and peaches alleged to have been delivered by him to it.

g. Whether or not defendants have entered upon, seized or occupied the house of plaintiff, or have appropriated to their own use any or all of the land or all or any of the said personal property described in said contract, or falsely or at all claim that plaintiff has broken his contract, or that they are entitled to take over, or have resumed possession of said real property, or all or any of the personalty of said ranch, or that plaintiff has forfeited all or any right, title or interest in or to said property or the whole thereof, or any part thereof, including the sum of six thousand (6000) dollars in cash paid by plaintiff to defendants on December 1st, 1919, as in said complaint stated, together with all moneys received from the sale of fruit, or all moneys to be realized hereafter

from the sale of fruit regularly assigned to them by plaintiff as in said complaint set forth, or at all. [79]

h. What sum the defendants have received from the California Co-operative Canneries for the fruit delivered to it by plaintiff.

IV.

That the said first alleged cause of action in said complaint stated is unintelligible for the reasons, and each of them, that it is herein alleged to be uncertain.

V.

That the said first alleged cause of action in said complaint stated is ambiguous for the reasons, and each of them, that it is herein alleged to be uncertain.

VI.

That said second alleged cause of action in said complaint stated is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom:

a. When or where defendants wrongfully and unlawfully, or wrongfully or unlawfully, or at all, converted to their own use the personal property set forth therein;

b. Whether or not any portion of the property set forth in Paragraph Two of said alleged second cause of action is the personal property described in the list attached to Exhibit "A" and made a part of said complaint.

VII.

That said second alleged cause of action is un-

intelligible for the reasons, and each of them, that it is hereinbefore alleged to be uncertain.

VIII.

That said second alleged cause of action in said complaint stated is ambiguous for the reasons, and each of them, that it is hereinabove alleged to be uncertain. [80]

IX.

That several causes of action have been improperly united in this, that a cause of action for breach of contract and damages therefor has been improperly united with a cause of action for the conversion of personal property.

X.

That several causes of action have been improperly united and not separately stated in said second alleged cause of action in this, that a cause of action for breach of contract and damages has been joined and stated with a cause of action for the conversion of personal property.

WHEREFORE defendants pray that plaintiff take nothing and that they be hence dismissed with their costs.

EDWIN A. WILCOX,
FRY & JENKINS,
Attorneys for Defendants.

Superior Court of the County of Santa Clara,
State of California.

At a session of the Superior Court, held at the
courthouse, in the County of Santa Clara, on
the 13th day of May, in the year of our Lord
one thousand nine hundred and twenty-one.
Present: Hon. J. R. WELCH, Superior
Judge; Henry A. Pfister, Clerk, and George
W. Lyle, Sheriff.

27,113.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN et al.,

Defendants.

Demurrer and motion to strike heretofore
submitted.

The Court now makes its order sustaining de-
murrer herein, five days to amend after notice. [81]

In the Superior Court of the State of California,
in and for the County of Santa Clara.

Department Number One.—Hon. J. R. WELCH,
Judge.

#27,113.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN et al.,

Defendants.

OPINION.

Action for damages for breach of contract for sale and purchase of real estate. So far as necessary to state on disposing of the demurrer herein, plaintiff and defendants on December 1st, 1919, entered into a contract whereby defendants agreed to sell and plaintiff agreed to buy a piece of real estate for \$51,000.00, \$6,000.00 of which to be paid and which was paid on the execution of the contract, and the balance of \$45,000.00 in five years, with interest payable annually at the rate of six per cent.

Plaintiff alleges that on December 1, 1920, there was due on interest to defendant the sum of \$2700.00, and on this amount the sum of \$1880.28 has been paid in cash.

The contract further provides that the seller shall retain title to sixty per cent of the fruit and products to be grown upon said real estate and that upon the sale of such fruits and products the proceeds thereof are to be applied, first, to the interest then due and the balance upon the principal then unpaid. [82]

It is alleged that defendants now have about \$5000.00 worth of fruits so retained by them under said contract which have not been disposed of or sold. Plaintiff alleges that such fruits so retained under the terms of said contract are taken and retained as security for said interest and principal. The Court thinks that this is a correct interpretation of the contract. Notwithstanding that defendants have this security, it does not follow that

defendants have breached their contract by taking possession of the land sold. The interest was to be paid independently of the non sale of the security. Hence on the face of the pleadings plaintiff was in default of the payment of \$819.72 in interest on December 1st, 1920. Demurrer sustained.

Dated May 11th, 1921.

J. R. WELCH,
Judge."

The COURT.—An alien may have the right to resort to either one of two tribunals. He has a right to go into the state court. He, like any other suitor, has his right to dismiss at any time; he may for reasons best known to himself, dismiss; that does not preclude him of the right to proceed in any tribunal that is open to him. If you have anything that runs counter to that, I would like to hear it.

Mr. SCHLESINGER.—The Rickey Case in 156 Federal, and the case of Wolf vs. District Court, 235 Fed. 72.

The COURT.—There is no doubt about the principal that if one seeks to have his rights determined in one tribunal, and there is a definitive and binding judgment in the case, he cannot go to another tribunal and be heard on the same matter. He has had his day in court. But these principals have application only in the character of instances I have indicated. It must be a [83] final determination upon the merits. It is true the final determination of the merits may be had upon de-

murrer. But from your statement it never reached that point.

Mr. SCHLESINGER.—It reached the point that the demurrer was sustained, before the judgment was entered, he dismissed his cause without prejudice.

The COURT.—You offer the amendment and I will rule upon it.

Mr. SCHLESINGER.—In the same connection I will also offer in evidence a certified copy of the complaint, likewise duly authenticated, a copy of the demurrer and the order sustaining the same, and the opinion of the lower court.

* * * * *

The COURT.—If this is to be pleaded as *res adjudicata*, I do not think the statement made brings it within the doctrine of *res adjudicata*. A demurrer had been sustained, and the parties given a right to amend.

* * * * *

The COURT.—The motion to amend will be denied.

Mr. SCHLESINGER.—We take an exception. (Tr., pp. 3 to 5.)

That on the trial of said cause the following testimony was given, viz:

Testimony of Frederick Genn Bromley, in His Own Behalf.

FREDERICK GENN BROMLEY, the plaintiff, called in his own behalf after being duly sworn, testified as follows:

I am a citizen of the United Kingdom of Great

(Testimony of Frederick Genn Bromley.)

Britain and was such at the time of the commencement of this action. I have been in the United States about three years. I came here as an invalid. I was wounded in the war. I came to San Francisco. [84] I visited in San Jose, Santa Clara County, about one year before I met Charles E. Warren and Mabel D. Warren. I was ranching in San Jose. That was my first experience in orcharding. When I met the Warrens I entered into a contract to purchase certain property. This is the contract which I signed. That is my signature.

Mr. BARENDT.—I offer it in evidence, and call your Honor's attention to the fact that it contains at the end a list of personal property.

The COURT.—It will be admitted.

And thereupon it was marked Plaintiff's Exhibit No. 1.

(Witness continuing:) After this contract had been signed and I paid \$6,000.00 I took possession of the property on the date stipulated in the contract. I farmed that property thoroughly. I had a diary stating from day to day what I did on the orchard. I cannot remember what I did without consulting the diary. The entries were made by myself each night and they are in my own handwriting. The entries on each date were made in the evening, after the work was done; in the evening of the particular day. It is all in my own handwriting. I irrigated the place. I pruned the trees thoroughly. I did not personally prune the

(Testimony of Frederick Genn Bromley.)

trees, I had an expert orchardist. It was the laborer which I took over when I took the ranch; he was handed over to me. I was to pay this laborer. His name was Okumura; he was a Japanese; he had been in the employ of the Warrens for seven years; he was supposed to know all about it; and I retained him. He did the pruning in the early season; the later pruning was done by another man, whom I consider far more efficient, Savio. I cultivated that ranch in a perfect manner, three furrow, double disking, and a cultivator; both implements I had to buy as those remaining on [85] the ranch when I bought it were broken, and not fit to use. I had to buy a new tractor on the 17th of January, 1920, or else waste the whole of my time. It was impossible to sell the one that was there for anything else but old metal. I got \$30 or \$40 for it. It was tried two or three times by prospective buyers, but it was no good. Yes, I had to buy many tools that were necessary for working on the place,—hammers, wrenches, picks, spades. The diary showed that I did pruning, disking, ditching and irrigating, the entire work that was necessary. At no time between December 1, 1919, and December 8, 1920, did Mr. or Mrs. Warren ever tell me that I was not cultivating properly, or that I was not irrigating properly, or that I was not pruning properly.

I saw Mr. Warren very frequently during that time. We were on friendly terms; we visited one another's orchards and houses. I made arrange-

(Testimony of Frederick Genn Bromley.)

ments for the sale of my crops when the proper time arrived. It was discussed between Mr. Warren and myself; we both agreed,—it was in his house at dinner one night—we agreed that the prunes should be sold in the usual way, to the Prune Association; and the apricots and other fruits should go to the California Co-operative Association. We worked in conjunction, and agreed on the sales of the little items, such as the grapes, and a few other things, small items; and as far as I could understand we worked harmoniously together; there was no trouble. The fruit has not yet been all paid for. I have not had my final settlement from the Prune and Apricot Growers Association. I think I have had my final settlement with the California Co-operative Canneries, but it was not before December 8, 1920. (Tr. pp. 5 to 17.)

Q. In other words, had you had any payments at all from the California Co-operative Canneries?

A. Advances made [86] against prospective results on the property.

Q. Do you know whether or not Mr. Warren was an officer of that corporation?

A. I have an idea that he was.

(Witness continuing:) The Prune and Apricot Association had not paid in full before December 8, 1920. There were fifty-one acres in that tract. The larger portion is in prunes and apricots and pears. I have not any exact idea of the different acreages. About one-half would be prunes and the balance would be pears. I only had about a

(Testimony of Frederick Genn Bromley.)

half a dozen peach trees, and a few grapes, and a small patch planted in young trees, nothing bearing. When I went on the place the old trees were very bad. I took it for granted they were interplanted with trees that would grow up in five years. (Tr. pp. 17, 18.)

I thoroughly irrigated as soon as water was available. I had to put in some new pipe. I had run a sectional pipe laying from the main pump up to the orchard. I irrigated as far as it was possible to put water out while I was there. I had a conversation with Mr. Warren with reference to the irrigating and we arranged that work; he drew water from the creek after I had stopped pumping. I drew water higher up on the creek; my pump was large, consequently there was very little water for the next man when I was pumping. Mr. Warren came to me about it two or three times. I think he must have been on the orchard every day I was irrigating; he saw how things went on. I had to tell him when I stopped pumping, so he could get water; he pumped at night. I pumped all day, as soon as water was available. (Tr. pp. 18, 19.)

Q. Did you make any irrigation ditches?

A. That had to be done,—and they were thoroughly good irrigating ditches.

(Witness continuing:) I personally operated the tractor for the whole of the time. I had help and all that was necessary; [87] in fact, more than Mr. Warren had, I believe; I had assistants many

(Testimony of Frederick Genn Bromley.)

times. I served upon the California Co-operative Canneries a notice of the rights of Mr. Warren. I acquainted them with the fact that Mr. Warren was entitled to sixty per cent of the crop delivered. I received an acknowledgment of that order. I did the same with the Prune and Apricot Growers Association. When I sold my grapes I shared them with Mr. Warren according to the stipulated amounts. He took sixty per cent. There were no walnuts. (Tr. pp. 19, 20.)

Q. Have you got any receipts from Mr. Warren for any of the moneys you paid him—did you get receipts? A. Yes.

Q. He gave you a receipt for grapes?

A. Yes; he could not give receipts for other moneys because it would be from the association.

(Witness continuing:) Whatever moneys I got prior to December 8, 1920, the proceeds were paid direct to Mr. Warren. In the matter of the grapes, I got cash and paid him and he receipted for it. I learned that the pruning had been improperly done upon that orchard. Expert orchardists and fruit men told me practically the entire season's crop of prunes had been pruned off the trees. Okumura did that. He is the man who was recommended to me by Mr. Warren. He was Mr. Warren's laborer. He was there when I went there. I only had a limited experience as an orchardist; my only experience was here in California on a small ranch I had one year before buying this

(Testimony of Frederick Genn Bromley.)

property; that was thoroughly successful. (Tr. pp. 20, 21.)

Q. Did you pay the first installment of taxes on this property, rather the second installment, some time between the first of 1919, and April or May? [88]

A. No; on that occasion I wrote to the Tax Collector asking if he would hold that over.

Q. You are familiar with the method of paying taxes here in two installments,—the fiscal year is from July 1st to June 30th? A. Yes.

Q. They are payable in two installments?

A. Yes.

Q. When you took possession there would be the second installment coming due in the following spring? A. Yes.

Yes, that applied to my taxes on the prior property. There were no taxes due on this property until the end of November. On that occasion when the demand was made I wrote to the Tax Collector and asked him to hold it over.

The COURT.—Q. The taxes you are speaking of had accrued?

Mr. BARENDT.—Q. The taxes in November you did not pay?

A. No, I asked them to hold them over with interest until they were due on the next occasion, or when it was convenient for me to pay it.

(Witness continuing:) The last time I spoke to Mr. Warren before I learned he had taken possession of the property was the last week in November,

(Testimony of Frederick Genn Bromley.)

November 30th. My conversation with Mr. Warren then was that my foreman was leaving me on that date; that I was looking for another foreman, and should have one before January; it was not necessary to do any more labor on the ranch until that date. All that was necessary was to have someone look after my stock, and Mr. Warren agreed to look after my stock; that as this orchard was not giving me a living income I decided to go into business in the city and run down frequently to my orchard, which would be under the care of a foreman. I so explained to Mr. Warren. I left certain equipment in the house, [89] so that I could run down there and use it, stay there from time to time. Mr. Warren agreed to see that my stock was fed. I had two horses, one cow, some poultry, two dogs. Mr. Warren was going to receive the milk and eggs. He was perfectly willing to feed that stock while I was looking for another foreman to live on the place. He said he would see that the stock was fed in my absence. (Tr. pp. 21, 23.)

Q. When did you first learn that Mr. Warren had taken possession of the ranch?

A. My foreman—

Mr. SCHLESINGER.—That is objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

Mr. SCHLESINGER.—Exception.

(Witness continuing:) The first intimation I had of Mr. Warren's living in the house came from my

(Testimony of Frederick Genn Bromley.)

foreman in the shape of a letter, asking me if I knew that Mr. Warren was living in the house. It was early in December; my old foreman was still living on the place; his furniture was still there; he had a cottage; he had accommodations there; he wrote me inquiring was I aware that the Warrens were living in my house.

Q. Subsequent to that did you receive any written communication?

A. None whatever. I had no communication with the Warrens after arranging with the Warrens that they should feed my stock.

Q. Did you have any communication with Mr. Warren's attorney subsequent to that?

A. No; that came in after the letter from my foreman.

Q. I show you a letter dated December 9th, 1920, and ask [90] you if that is the letter you received? A. Yes.

Mr. BARENDT.—I offer this letter in evidence for the purpose of showing the date this notice was served.

Mr. SCHLESINGER.—That is objected to as incompetent, irrelevant and immaterial.

The COURT.—Overruled.

Mr. SCHLESINGER.—Exception.

Mr. BARENDT.—And for a further purpose of showing the conditions upon which a forfeiture is claimed.

The COURT.—Read it.

Mr. BARENDT.—This letter is on the letter-

(Testimony of Frederick Genn Bromley.)
head of Edwin A. Wilcox, Attorney and Counselor,
First National Bank Building, San Jose, California.

December 9, 1920.

Mr. F. Genn Bromley,
Claremont Apartments,
Apartment #2,
822 Clayton St.,
San Francisco, Calif.

Dear Sir:

Mr. and Mrs. Chas. E. Warren have requested me to notify you that owing to your failure to perform many of the terms and conditions on your part to be performed in their agreement to sell and your agreement to buy their 51.61 acres of land, part of Lots 5 and 6, and part of the Northeast quarter of the Southeast quarter of Section 10, Township 7, South Range 2 West, M. D. B. & M., Santa Clara County, California, and *personally* thereon, they have elected to terminate the agreement, and have taken possession of the property. All moneys heretofore paid on the purchase price will be treated as compensation for the rental and occupancy of the land, as provided by Section 16 of the agreement.

Yours very truly,

(Signed) EDWIN A. WILCOX.

EAW/lk.

Registered—return receipt requested. [91]

Mr. SCHLESINGER.—May I ask if he answered that? A. Personally.

(Testimony of Frederick Genn Bromley.)

(Witness continuing:) I did not at any time tell Mr. Warren that I did not intend to return to my ranch. I did not tell anybody that I did not intend to do so. It was impossible to cultivate the one and one-half acres of walnut trees. I left it alone. It had been roughly plowed in the wet season and left in that condition and the furrows were as hard as bricks. I discussed the matter with Mr. Warren; we decided to leave it as it was. (Tr. pp. 23, 25.)

Q. What was the condition of those trees?

A. Entirely dead.

The COURT.—Q. What is the nature of the soil,—adobe? A. Clay.

(Witness continuing:) I know what “adobe” is, I attempted to remove the borers. I had two men working, and myself as well removing borers. I was told by one man who was removing the borers that no borer work had been done on that place at least for nine years.

The COURT.—What is “removing the borers”?

Mr. BARENDT.—It is a white grub that goes into the root of the trees. Its presence is recognized by a substance on the outside of the tree. It rots the tree away.

(Witness continuing:) I removed some of the dead trees. With the other trees I did the very best I could with them. My pump will deliver one thousand gallons a minute. (Tr., pp. 25, 26.)

(Testimony of Frederick Genn Bromley.)

On cross-examination, the witness testified as follows:

I lived in San Jose about a year before I bought this [92] property. Mr. Cruthers went to the Warrens. I did not meet the Warrens until the contract was well on to completion. Mr. Cruthers is a real estate dealer in San Jose. I first entered into possession of the place for the purpose of farming it on December 1st; the day called for in the contract. I had Okumura in my employ at that time helping me to farm the place. He remained with me approximately a few months. I afterwards employed a man by the name of Savio. He remained in my employ to the end of November, 1920. At that time in November he was the only man there. I did not have anybody in December, looking after that property; the only one taking care of it was Mr. Warren; he was going to feed the cattle. (Tr., pp. 26, 27.)

Q. I am asking you whether you had anyone there in December. Between the time Savio left and December 8th did you have anyone there?

A. No.

The COURT.—Q. What time did you say he left?

A. At the end of November.

Q. There was a hiatus of eight days there was nobody there?

A. That is right. Mr. Warren had agreed to feed my cattle.

Mr. SCHLESINGER.—Q. Was there any occu-

(Testimony of Frederick Genn Bromley.)

pant of that house between November 30, 1920, and December 8, 1920, to your knowledge?

A. Not occupying the house.

(Witness continuing:) Savio was still on the place; on and off; he was not working. He had a small cottage. I moved to San Francisco October 9th. On the 30th of November I had a long talk with Mr. Warren. (Tr., p. 28.)

Q. Did you tell him in the middle of November, 1920, you and he being present, that you had no money, that you were discharging the man and were quitting the place,—or words to [93] that effect?

A. Certainly not quitting the place. I had no intention of doing such a thing.

Q. Did you tell him you were discharging the man? A. Yes.

Q. To whom did you have reference to when you said you were discharging the man?

A. Savio.

Q. You had no one else there but Savio.

A. No.

Q. Was anyone in occupancy of that place on December 7, 1920? A. Not to my knowledge.

Q. Was anyone in occupancy of that place at any time between December 1, 1920, and December 8, 1920, to your knowledge?

A. Mr. Warren had access to the house the whole time, but no one was living in the house.

Q. Don't you know that the Warrens were not living there, that they lived on the adjoining property?

(Testimony of Frederick Genn Bromley.)

A. They had the adjoining property.

(Witness continuing:) On December 8, 1920, I had furniture enough for a bachelor to live with; cooking utensils, bed in the bedroom; several things that I had left there, in the way of carpets, many articles; my personal clothing; my wife's personal clothing,—a lot of it; there were such things as would go in the garden, garden furniture. Between October 9, 1920, and December 8, 1920, I had moved away nearly all my furniture. What was necessary for that house I had in my house in San Francisco. I know that a ranch needs care. (Tr., pp. 28, 30.)

Q. Did you on the 4th day of December, 1920, receive a citation from the Labor Commissioner of San Francisco, ordering you to show cause why a warrant should not be issued for your arrest for failure to pay Savio?

Mr. BARENDT.—That is objected to as incompetent, irrelevant [94] and immaterial, and not within the issues.

Mr. SCHLESINGER.—It goes to the question of his good faith, and to the question of abandonment.

The COURT.—Objection sustained.

Mr. SCHLESINGER.—Exception.

(Witness continuing:) Savio's parting conversation with me was that he regretted having to leave me, but naturally he had a wife and family, and he had to get work and receive his salary. He knew that I could not pay him his salary at that time,

(Testimony of Frederick Genn Bromley.)

but would do so; I even gave him an order on the Prune Growers' Association to receive payment when they advanced me moneys on the crop. Savio knows to-day that immediately I have that money at my disposal he will receive his money, and our relationship is perfectly good. I know the concern of Elmer Brothers, nurserymen in San Jose. On July 26, 1920, I believe I left an order with them for 300 trees. I wanted to comply with my contract concerning replanting. (Tr., pp. 30, 31)

Q. Did you subsequently, on the 20th day of October, 1920, cancel that order, stating to the young lady, who was the bookkeeper there, that you wanted to cancel the order because you no longer had any use for the trees, as you intended to leave the country—answer “yes” or “no.”

A. No. If I may be allowed to explain, I cannot give you the exact date, it was young Elmer himself I saw; it was on one of my visits to San Jose; it was after Christmas, I think in January, I told him that I should not need those trees, could he cancel the order.

The COURT.—Q. When were the trees ordered for?

A. As soon as possible; when the proper time for planting came.

Q. At the time when you gave the order?

A. When the rain [95] comes.

Mr. SCHLESINGER.—Q. Didn't you, as a matter of fact, cancel the order for those trees on or about the 20th day of October, 1920?

(Testimony of Frederick Genn Bromley.)

A. I don't think so. I think the order was canceled after Christmas, when I saw young Elmer himself. It was when I visited San Jose, after I had been living in the city here.

Q. Don't you know that you canceled that order after you left San Jose with your family, taking with you your household furniture—wasn't it shortly after that time you canceled the order for the trees? A. After I left San Jose, yes.

(Witness continuing:) I cannot call to mind Mr. Joseph T. Brooks of the California Prune and Apricot Growers' Association, Incorporated, of San Jose. I did not in the fall of 1920 state to Mr. Brooks, at his office, or rather at the office of the California Prune and Apricot Growers' Association, Incorporated, in San Jose, in substance because of my inability to raise certain funds I expected to give up the ranch, and leave for some northern country. I had a few conversations with people in San Jose, officials whom I met, and even meet to-day, and told them the orchard was not a profitable investment; that I meant to go through with my contract, but I should leave the place in the hands of a foreman, visiting it frequently, but would also follow my previous business pursuits. I did not, in the same conversation, or in a subsequent conversation, state to him at his office that I was on my way from the south, that I was bound for the northern part of the State, and that I was very solicitous of securing \$100; that I was flat broke. I did not have that talk with Mr. Brooks.

(Testimony of Frederick Genn Bromley.)

Q. Did you at either of those conversations I have indicated, or at any other time? [96]

Mr. BARENDT.—I object to the words “or at any other time.”

The COURT.—Objection sustained.

Mr. SCHLESINGER.—Exception.

Q. Did you have the first conversation I have interrogated you about in the fall of 1920, at his office in San Jose? A. No.

(Witness continuing:) I know Mr. Wilson very well. He keeps a general merchandise store at Cupertino. Around about October 1, 1920, it was quite possible I had a conversation with him.

Q. Did you at that conversation with Mr. Wilson tell him in substance that the ranch which you had bought from the Warrens was no good, and that while you had funds in other countries, you did not intend to put any more money in the Warren Ranch proposition, or to use any of your funds to take care of the Warren place?

A. The first part of the conversation, I think you are correct. I believe I said to Wilson, as well as to several others, that the ranch was not profitable—was not a profitable investment; that I intended to take care of it to the best of my ability, and carry out my contract to the letter, but I must combine it with my other business pursuits.

Q. You did not have the conversation with him which I have narrated as your having?

A. No—that I would not pay my debts.

(Testimony of Frederick Genn Bromley.)

Q. I will ask you if you know Mr. Ralph Spencer of the Co-operative Canneries? A. Very well.

(Witness continuing:) It is quite possible that I had a conversation with him at the office of the Co-operative Canneries in the month of October, 1920, concerning this ranch. I did not in that conversation state in substance that I had quit the place [97] and had to give it up. (Tr., 31-36.)

Counsel for plaintiff having objected that the line of question was incompetent, irrelevant and immaterial, it appearing that possession of the property had been taken for the reasons set out in the notice and that no abandonment had been pleaded, the following colloquy took place:

The COURT.—I am looking for the specific features of the answer upon which the defendants rely as to the grounds of their undertaking to cancel the contract. Where is that to be found?

Mr. SCHLESINGER.—We claim, in substance, in Paragraph 4, where the charge is of having entered that orchard during his absence. We want to show that he intended to, and actually did abandon that property; and we had the right to re-enter the property for our own protection, and not to his damage; that is the purpose of this. That question, and his willingness and good faith in things of this character are also admissible. Here is the situation: This man, after he made this contract, went out and created debts and borrowed money.

The COURT.—Where is there anything in these

pleadings to raise an issue which would enable you to introduce evidence of this character?

Mr. SCHLESINGER.—Paragraph 2, denying that he farmed the land in a farmer-like manner. And Paragraph 3, answering Paragraph 4 of the complaint, we say that the plaintiff did not place in the temporary care of a competent foreman. We admit that we did take possession of the property on December 8, 1920, because he had breached his contract, and all his rights had terminated; we further say that we entered, denying that we entered without legal right. That was an orchard which needs constant [98] care; we certainly have a right to protect the property.

The COURT.—You will have a hard time undertaking to breach this contract upon any ground that is not alleged here.

Mr. SCHLESINGER.—This place was left alone. What were we to do? Allow it to go to rack and ruin, and not take care of it?

The COURT.—Confine yourself to the issues.

Mr. SCHLESINGER.—I contend that under Paragraph 3 of the answer in this case we are entitled to show the intention upon the part of this man to abandon that place; we can show that by his declarations to abandon, in connection with the fact that he said to these people he intended to abandon.

The COURT.—If it tends to show anything that would give you a right of cancellation of the contract and re-entry upon the premises. The trouble

is, you have not alleged,—at least I cannot find it,—that he ever informed you that he was going to abandon the place.

Mr. SCHLESINGER.—The contract gives us the right to enter for the purposes of inspection. Under the contract, we claim there is implied, when, as in this case, two men enter into a contract, and a small portion of the purchase price is paid down, and that out of the crops to be gathered 60 per cent is to go on the purchase price and 40 per cent to be retained by the buyer, in that kind of a case where the evidence would tend to show that the vendee abandoned the place, and announces his intention to abandon, that we have a perfect right to go in there and work it in a farmer-like way.

The COURT.—If it does not bear pertinently upon the issues, I will have to disregard it.

Mr. BARENDT.—That is objected to. They have stated [99] specifically in their notice the grounds upon which they have terminated this contract; they cannot change that now.

The COURT.—That gives rise to estoppel *in pais*, if that is the fact.

Mr. SCHLESINGER.—It says “owing to your failure to perform many of the terms and conditions on your part.” It does not state specifically what the breaches were. We entered the premises before the notice was given, and, as a matter of fact, found that place abandoned; there was no one there; we are substantially interested in the prop-

(Testimony of Frederick Genn Bromley.)

erty. What were we to do? There was nobody there. Where is this man's damage,—I cannot see any. We did not rescind the contract. I will ask that the question be answered.

Mr. BARENDT.—I renew my objection.

The COURT.—Read the question.

(Last question read by Reporter.)

A. No.

The COURT.—Did you state anything of that kind? (Tr., pp. 36, 37, 38.)

(Witness continuing:) I made the general remark to many people that I was taking up my business pursuits, and that I was carrying the ranch on under a foreman, and I was visiting it, but I was carrying out my contract on the ranch. I do not think any taxes on that land were due from me until about the end of November. (Tr., pp. 38, 39.)

Q. Did you pay the taxes on that land, the first installment, for 1920?

The COURT.—The taxes which were due on November, 1920.

A. No. I wrote to the Tax Collector asking him to hold them over until the next installment was due, when was the usual time to pay [100] it.

Mr. SCHLESINGER.—Q. Don't you know that Mr. Warren paid that installment of taxes, after you had failed to pay it? A. No.

(Witness continuing:) I don't think I have a copy of the letter I sent the Tax Collector. I cannot tell without reference to the correspondence between myself and the California Canneries

(Testimony of Frederick Genn Bromley.)

whether the value of the fruit delivered to the California Canneries and the amount received from that delivery instead of being \$5,000 was \$894.07. The California Canneries advised the fruit-holders last October what the final settlement would amount to. It is co-operative. Every member of the association puts in his fruit; after it is all sold, the net profits are divided *pro rata* amongst those who put their fruit into the association.

The COURT.—Q. Without reference to the quantities?

A. No; they are all graded and all sorted out, and the quantities arrived at. When everything is paid, then the net proceeds are divided *pro rata* amongst the members.

(Witness continuing:.) It is a co-operative association,—[101] they market the fruit, and after taking out the overhead, they divide the net profits amongst those in accordance with the amount of fruit they surrender, and that would not be known until their sales are finished. In October last, I think, was the final statement from the Co-operative Canneries as to what the proceeds were. (Tr., pp. 39, 40.)

Q. October, 1921? A. This last October.

Q. On their operations for the fruit of 1920?

A. Yes. The Prune Growers' Association have not done so yet.

Q. For the crop of 1920?

A. For the crop of 1920.

Mr. SCHLESINGER.—Where did you get these

(Testimony of Frederick Genn Bromley.)

figures from, that the value of the fruit delivered to the California Canneries was \$5,000?

A. I cannot tell you. I have no recollection.

Q. Do you know how much money was due for interest on this contract on December 1, 1920?

A. To my mind, nothing was due. It was due, subject to the final maturing of the crops, and that was where interest and capital were both to be paid from.

Mr. SCHLESINGER.—Q. Assuming there was interest due December 1, 1920, in the sum of \$2,700, that is figuring interest at the rate of 6 per cent, according to the contract, and allowing for your share of the fruit according to the contract, is it not a fact that there was due on December 1, 1920, the sum of \$2,700.00 on interest alone?

Mr. BARENDT.—That is objected to; it is calling for the opinion of the witness and calls for him to interpret the contract.

The COURT.—Sustained.

Mr. SCHLESINGER.—Exception. [102]

Q. Did you pay any interest outside of the credit being allowed for the fruit which was sold to the Canneries, have you paid any interest?

The COURT.—Outside of that which would be derived from the receipt of the fruit?

A. No, unless the moneys received from the sale of the grapes are paid against the interest accruing.

The COURT.—Q. It would, under the contract, be credited first to interest?

(Testimony of Frederick Genn Bromley.)

A. Mr. Warren has received moneys from the sale of grapes.

(Witness continuing:) I disced the orchard.

Q. (Mr. SCHLESINGER.) Did you plow any of that orchard,—yes or no? A. Yes.

Q. What do you mean? Do you make a distinction between “discing the orchard,” and “plowing the orchard”?

A. The flat lands were all double-disced, worked with the disc and cultivator, and the banks where it was impossible to pull a disc were plowed with a horse plow. (Tr., pp. 40–42.)

The witness, by consent of the Court, was then recalled for further direct examination.

Mr. BARENDT.—Q. Mr. Bromley, in your complaint you have alleged that you expended \$3,825 for labor during the year you were on the ranch: How did you arrive at that figure?

A. \$1,300 paid out for hired labor; \$2,500 for my own labor, a total of \$3,800.

Q. In the second cause of action you have alleged that there was taken from you a number of items, a number of implements, etc: One tractor, of the value of \$1,575: What did you pay for the tractor; in other words, was that the contract price? [103]

\$500 is the amount I paid when making the contract.

The COURT.—Q. You mean you paid that down?

A. Yes; I paid that down.

The COURT.—What was the contract price, the

(Testimony of Frederick Genn Bromley.)

whole price? Is the figure set down in your complaint?

Mr. BARENDT.—\$1,575.

The WITNESS.—\$500 of which I paid, and the balance to be paid for.

Mr. BARENDT.—Q. Is that the tractor bill, for \$1,575 (showing)? A. Yes.

Q. (Reading.) “Credit, \$500, cash”? A. Yes.

Q. Do you know what became of that tractor?

A. It was reported to me that Mr. Warren still has it; I think so.

Mr. BARENDT.—Q. (Reading.) One bean sprayer: How much did you pay for that?

The COURT.—Q. A sprayer for fruit trees?

A. Yes. I bought that for \$530.

Mr. BARENDT.—I offer this bill for one Fageol Tractor in evidence.

(Bill marked: “Plaintiff’s Exhibit No. 3.”)

Mr. BARENDT.—I also offer the bill for the bean sprayer in evidence.

(The document was here marked: “Plaintiff’s Exhibit No. 4.”)

(Witness continuing:) There is a credit of \$250 on the bean sprayer. It has been returned to the Bean Spray Pump Company. I asked them to take it away. They asked me, was I prepared to pay in full. I said “No; will you kindly take possession of it, re-sell it, and charge me with the difference.” I cannot tell you exactly when it was, but it was last year, after I had left the [104] ranch, while Mr. Warren was in possession. The value of the

(Testimony of Frederick Genn Bromley.)

hay was \$179.63, not paid for. It was delivered the end of November and December. Part of it was delivered in December. I got that to feed my cattle while I was still away. I paid for lumber \$56.75. I left it on the ranch. One cultivator \$150.00, that I believe is still on the ranch. I paid \$150.00 for it. I paid \$190 in cash for the disc. Three hundred fruit trays, \$300.00. I left those on the ranch. 150 large boxes, I charge \$100.00 for those. I left those on the ranch.

The COURT.—Q. What did you pay for those boxes?

A. I made them, mostly. I bought the lumber and made the boxes.

(Witness continuing:) I charge \$100 for the whole lot of chickens. One cook stove \$20.00, that I left on the ranch. Brussels Carpet \$150, that was left on the ranch. I left one riding horse there, and put a value of \$100 on it. (Tr., pp. 42–46.)

The COURT.—Q. Do you know if the defendants had appropriated that property and made use of it?

Mr. SCHLESINGER.—He charges that in his complaint. A. I cannot tell you.

The COURT.—Q. They never turned it over to you?

A. They have appropriated it; whether they used it, I don't know.

(Witness continuing:) I valued the grass rug at \$27.00. I paid a great deal more for it, I believe. Ice chest \$30.00. I bought that in San Jose. I think it is valued at more than that. I left it

(Testimony of Frederick Genn Bromley.)

there. Wire window screens \$10.00. Brass curtain rods, \$15.00. I left those there. I paid more than that for them. Linoleum \$38.00, which cost me more than that figure. I left it there. I had sufficient down there; I [105] could take my wife and little girl down there; bed, sheets, blankets, a chair, wash-stand; that is all, I think, in the bedroom. I left cooking utensils, cook-stove, ice-chest, plates and cups and saucers, knives and forks, and sufficient crockery to eat with. I left lots of personal clothing of my own and my wife's; my military uniform. I have not a list of how many shirts and pajamas, and undervests, but there is quite a quantity of it. My military uniform, and my military kit is there, my working clothes for the labor, my boots, plenty of them, cover-alls. Some of my wife's clothes were left there, dresses, millinery, underwear and her riding clothes. (Tr., pp. 46-48.)

Mr. BARENDT.—Q. You have put down \$200 for personal effects; what did those uniforms cost you? A. 150 sovereigns, sterling.

Q. That would be about \$450? A. Yes.

Q. Did you leave a baby-buggy there? A. Yes.

Q. Those things were all left there by you?

A. Yes.

Q. Did you leave a trunk there?

A. Two, if not three.

Q. You have put together all those dresses, those uniforms, and your trunk, and your bed-room furniture at \$200?

(Testimony of Frederick Genn Bromley.)

A. Yes; it is a very modest figure. (Tr., pp. 48-49.)

On further cross-examination said witness testified as follows:

I bought that tractor from Artana-Geoffroy Company on conditional sale. Not to my knowledge was the tractor retaken by the seller from whom I had agreed to buy it. I don't know it [106] to be the fact. I have seen Mr. Artana since; he did not mention it to me; he gave me a different version of it. (Tr., pp. 49, 50.)

Mr. SCHLESINGER.—Q. You say you don't know whether it was retaken by the people from whom you bought it. You say you have no knowledge on that subject: That is right? A. Yes.

Q. When you swore to this complaint, charging us with having taken it from you, you did not know what the fact was?

A. It was on the ranch, as far as I know.

(Witness continuing:) I bought the bean sprayer from the sprayer company. I paid part cash, and the rest of the payments were to be made later. I asked them to take it; when they took delivery of it, they told me in the difference in time they had sent it, and had taken it away, it had every appearance of being used. At my request they took possession of that article. I left the ranch on October 7th, taking what household furniture was necessary to furnish my flat in this city. I cannot say exactly how much there was on the date that I left but part of the quantity I had contracted for, and quite suf-

(Testimony of Frederick Genn Bromley.)

ficient for feeding the stock. I was not short of feed. It was all left in good condition. I was on the place between the time I left and December 8th, when the defendants re-entered the place. I cannot tell you how many times but it was several times just for visits. I was there a few times before the Warrens took possession. It must have been around November 30th that I was there. (Tr. pp. 50-52.)

The COURT.—Mr. Bromley, he is talking about the period between December 1st and December 8th, when they retook possession of this property.

Q. Between the first of December and the eighth of December how often were you there? [107]

A. I don't think I was there from November 30th.

Q. You were there between October 7th and December 1st? A. Surely.

Mr. SCHLESINGER.—Q. Were you there during the month of November at all? A. Yes.

Q. How many times; were you there more than two?

A. I should say yes, because it was rarely a week I missed without going down.

Q. Were you there at all during the month of November? A. Yes.

Q. Were you there during the latter part of November? A. Yes.

Q. Was there any hay there at that time?

A. Yes; my stock was looked after.

(Testimony of Frederick Genn Bromley.)

(Witness continuing:) Savio was taking care of the stock at that time. When my man left there in the early part of December there was hay there. I was not there after the first of December. I had a horse and a cow. They required feeding. I had hay there for that purpose. According to my knowledge Mr. Warren fed the stock after my man left; he arranged with me to feed the stock. I had arranged with Mr. Warren to go into that place and take care of my stock. I made no arrangements for the care of the ranch; there was nothing whatever to do; no work necessary to be done on the ranch. (Tr., pp. 52-54.)

Q. Mr. Bromley, do you testify that it was your intention that nobody should farm that place, and look after it between October and February, at which time you intended returning?

A. There was work done after October. There was no work necessary to be done from the 1st of December until the end of [108] January.

Q. What work was done during the month of October, to your knowledge?

A. The ranch was cleaned up and all the scrub burned.

Q. What work was done during the month of November? A. The same.

Q. What work did you expect to do there and have done during December and February?

A. There was nothing to do.

Q. What did you ask Mr. Warren to do for you?

A. Feed my cattle.

(Testimony of Frederick Genn Bromley.)

Q. And only feed your cattle?

A. That is all.

Q. You had no man in charge of that place during that time? A. No.

The COURT.—Q. They were to milk the cows?

A. Yes.

Q. Were the cows giving milk?

A. Yes,—one cow.

(Witness continuing:) No it was not my intention that the ranch should be uncared for between the first of December and February. I expected to have a foreman in before the first of February; it was my intention to do so; in fact, I would have a foreman there as soon as I could have found a suitable man. I had let my foreman go. I do not know that ranches in that country situated in that locality require care between the months of December and February. I am not an expert orchardist. The irrigating season in that locality was when the creek had water in it sufficient to start the pumps. I don't think there were any rains between December and February. There was no water in that creek before March. (Tr., pp. 54, 55.) [109]

Q. Were you there between December and February? A. There was no need to be there.

Q. Were you there, after relinquishing the place?

A. When Warren took possession of the orchard I washed my hands of it, and told him so.

Q. Regarding those items: There was a tractor, was there not, belonging to Mr. Warren?

A. When I bought the place, yes.

(Testimony of Frederick Genn Bromley.)

Q. Did you sell it? A. Yes.

Q. You kept the money?

A. Yes, surely. I sold it and Mr. Warren knew it was useless as a tractor; in fact, I doubt whether it was useful as old iron.

(Witness continuing:) The riding-horse was there at the end of November. It was not only a riding-horse; it was used for a work horse too; in fact, my small ranch was worked entirely with that horse for one year, and it did considerable work on this orchard, as well as hauling tile, and worked on the farm wagon, in harness with the colt. I have never made a demand upon the Warrens for any of these articles of personal property. (Tr., pp. 55, 56.)

Q. Have you ever made a demand upon the Warrens at any time to allow you to perform your contract?

Mr. BARENDT.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Yes. Where one party to a contract assumes to cancel it, the other party has one of two remedies,—that is, in the event he has a right. He may either sue for specific performance, or he may acquiesce in the cancellation, and sue for damages. This action proceeds on the latter ground; [110] acquiesce in the rescission and suit for damages.

Mr. SCHLESINGER.—There can be no rescission while the man remains in default.

The COURT.—I understand what you mean.

(Testimony of Frederick Genn Bromley.)

Mr. SCHLESINGER.—Where a buyer is in default he has obligations.

The COURT.—That is a question of law. This action is brought upon the theory that he acquiesced in the rescission or cancellation, and is suing for damages.

Mr. SCHLESINGER.—And that he was not in default.

The COURT.—And that he was not in default.

Mr. SCHLESINGER.—Q. The Warrens re-entered that ranch on the 8th day of December, 1920. You know that to be the fact?

The COURT.—He says he was told so.

Mr. SCHLESINGER.—Q. You know there was no one in charge when they made that entry: That you know to be so? A. No one in charge.

Q. Do you know what they have done on that ranch since you left it?

Mr. BARENDT.—Objected to as incompetent, irrelevant, and immaterial.

The COURT.—Objection sustained.

Mr. SCHLESINGER.—Exception.

The COURT.—He is not concerned with what they have done there since they went there.

Mr. SCHLESINGER.—Q. Do you know what they did on entering that ranch? What the first thing they did with reference to the care of the trees?

Mr. BARENDT.—Objected to as incompetent, irrelevant and immaterial. [111]

The COURT.—Sustained.

Mr. SCHLESINGER.—Exception.

(Testimony of Frederick Genn Bromley.)

(Witness continuing:) I remained in possession of that ranch either by myself or foreman until about the first day of December. I said the work was necessary to commence the first of February. I believe I led Mr. Warren to understand that as soon as I could find a suitable foreman he would be installed,—certainly by the end of January or the 1st of February. I considered that the first of February it would be necessary to commence work. I know Mr. Frank King of San Jose. (Tr., pp. 56–58.)

Mr. SCHLESINGER.—Q. Didn't you, on or about January 7, 1921, have a conversation with Mr. King, in San Jose, and the persons present being yourself and Mr. King; didn't you in January 7, 1921, or thereabouts, at the office of Mr. Wilcox have a conversation with Mr. King, Mr. Wilcox, and yourself and Mr. King being present,—answer "yes" or "no."

A. I remember having a conversation at Mr. Wilcox's office; Mr. King is a friend of mine; I had many conversations with King, both on business and friendship.

Q. Didn't you in this conversation, at the time and place I have indicated, and within the hearing of the persons named, state, in effect, "I have quit the ranch," and "I would not take back the place at any price," yes or no?

* * * * *

The COURT.—It is entirely immaterial, it was after the ranch had been taken by the other party.

(Testimony of Frederick Genn Bromley.)

Mr. SCHLESINGER.—We take an exception. It also bears upon the question of damages. (Tr., pp. 59, 60.) [112]

(Witness continuing:) During that year I was there I pruned all the trees in the orchard that needed pruning. I cannot tell you how many trees there were. I never checked up how many prune, or how many apricot, or how many pear trees there were. It was never specified in the contract when I bought the ranch. There was approximately one and one-half acres planted in yellow walnuts. I think I have already told you that I did not cultivate or irrigate the walnut trees. It was impossible. I did not know that the walnut trees died through lack of cultivation or irrigation, or both. I have my own views on the matter. I don't agree with yours. I removed dead trees as the contract provided. I cannot tell you how many; there was a large number of them. I kept a diary of the things that I did on that ranch. There is no entry in the diaries as to the number of dead trees I removed; there are entries "removing dead trees." After removing the dead trees I did not replant any trees. I ordered trees for replanting and cancelled the order. I cannot remember the date, but I believe my conversation with Mr. Elmer was after Christmas. I don't know how many trees should have been replanted in lieu of the dead ones, but I bought 300 trees, and that is the order I had cancelled. I believe I ordered those trees from Elmer Brothers on July 26, 1920. I cannot

(Testimony of Frederick Genn Bromley.)

remember whether I cancelled the order on the 20th of October, 1920. (Tr., pp. 60-62.)

Q. Don't you know, Mr. Bromley, that you only irrigated about one-half of the orchard?

A. No, I don't know that.

Q. Don't you know that as a result of your failure to irrigate the entire ranch, that there was a loss in trees to the amount of about \$1,500?

A. I do not agree with you.

Q. You don't know anything about that?

A. I don't agree with you. [113]

Q. What is the fact? Have you any knowledge of the fact?

A. Yes. The whole of the upper part of the orchard was irrigated thoroughly. I understand that the water broke over the banks and partially flooded the lower flat; by the time I had worked up to that bank there was no water to be drawn out of the creek. That means I irrigated thoroughly as long as water was available.

Q. There is another part of the contract which says you should eradicate rodents; there were rodents upon the place, as there are upon other places? A. In abundance.

Q. Did you eradicate any of the rodents?

A. As many as possible.

Q. Don't you know that the gophers killed some 73 trees, girdling the trees?

A. I believe that applied to every other ranch in the vicinity.

(Testimony of Frederick Genn Bromley.)

The COURT.—Q. Do you know anything about it?

A. Yes, they did; the exact number I cannot say, but they girdled many trees. (Tr., pp. 62–63.)

(Witness continuing:) I sprayed the pear trees twice during the season, on the date of February 10, 1920, “spraying pears, from 7 to 12 and 1 to 5:30.” Again spraying on the following day from 9 to 12, and in the afternoon from 1 to 5. Again on the following day from 7 to 5, spraying pears all the time. That was possibly the first spraying operation. The second took place when the fruit was just forming, which is customary, I believe, and takes some range of time.

The COURT.—Q. What date?

A. Later in the season.

(Witness continuing:) Under date of May 18th, spraying pears from 8 to 6, with arsenic of lead. Again on the following day from 8 in the morning until noon. That finished it. [114] I did not spray after that.

Mr. BARENDT.—Q. May I ask the witness to read the whole of the entry on that date?

A. (Reading:) “Spraying pears from 8 in the morning to 6:30 in the evening. Henry does his chores, and spraying pears.

Mr. BARENDT.—Q. Who is “Henry”?

A. Henry Savio.

Mr. SCHLESINGER.—Q. In the month of November, 1920, did you have a conversation with both Mrs. and Mr. Warren, in the city of San Jose,

(Testimony of Frederick Genn Bromley.)

at their home in Cupertino, you being present, in which you said in substance and effect that you had no money to pay the balance of unpaid interest due on December 1, 1920, or to care for the property; that you were going to discharge your man because you could not pay his wages, and you owed him a large sum of money, and that you would not do anything on the farm until February; if defendants wanted the ranch cared for, they must do it themselves,—or words to that effect?

A. Yes. This probably transpired at the same time,—that I was owing my man his wages; that I could not pay him, he would be paid later on; he was leaving me to find work. I also told them that all the work necessary to be done was finished up to the end of November, or would be, and that I had started my business in the city as a means of obtaining sufficient income to keep myself, and also provide funds for the overhead of that orchard, which was,—I believe I used the expression to Mr. Warren,—that it was a “white elephant.” I used that expression to other people as well. I also told Mr. Warren that I would be running up and down frequently to see that the work on the ranch was properly carried on, and I think I mentioned at the same time, that I should probably ask Mr. Warren to look after my stock during the time I was looking for a new foreman, and I again repeated that [115] on the 30th day of November, to which he agreed. Then I think there was some other conversation which took place at that time,

(Testimony of Frederick Genn Bromley.)

which you have not mentioned; Mr. Warren got very heated, and one thing and another—

The COURT.—(Intg.) State what it was.

A. I cannot recollect, but I think it was at that conversation that I mentioned that it was rather hard lines that we had parted with our crops and had done our work, but were not obtaining payments for the fruits. Warren said: "We are all in the same box; we have simply to put our shoulders to the wheel and pull through the best we can." I think that was at the same time.

Mr. SCHLESINGER.—Q. Did you not on that occasion apply to the Warrens for a loan?

A. No.

Q. You recollect that you did ask them to look after the stock, and not the ranch?

A. Exactly.

Q. You thought the stock was of much greater value than the ranch?

A. The stock needs feeding.

Q. As a matter of fact, did you have sufficient money to care for that property?

Mr. BARENDT.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Sustained.

Mr. SCHLESINGER.—Exception. It goes to his ability to carry out the contract. (Tr., pp. 63–66.)

The Court permitted an inquiry into the indebtedness of the plaintiff over the objection of his counsel, stating that he would admit it for the sole

(Testimony of Frederick Genn Bromley.)

purpose of its possible bearing on the question of damages. (Tr., p. 69.)

Q. Did you owe the Bank of San Jose at that time \$1,500, [116] or thereabouts?

A. Yes; it was amply covered by a provision for payments.

Q. Have you ever paid it? A. Not yet.

Q. Did you owe the Garden City Bank at that time [117] \$2,350, and interest from June 30, 1920?

A. The same answer applies to that.

Q. Have you ever paid it? A. No.

Q. Did you owe the Bean Spray Pump Company \$580?

A. The balance of the amount due on the sprayer, yes, I did owe that.

Q. Did you owe that as a balance due them?

A. Yes.

Q. Did you owe for the tractor \$360?

A. In the same way.

Q. Didn't you owe for groceries \$185?

A. The same answer applies.

Q. Didn't you owe Wilson for groceries at Cupertino \$400 on December 9, 1920, and don't you still owe it to him?

A. That I don't know anything about.

Q. What do you owe him on that.

A. I owed Mr. Wilson, I believe, in the fall; whether he received it I cannot tell you. I am waiting for advice from the Prune Growers Associa-

(Testimony of Frederick Genn Bromley.)

tion as to what arrangement was made with that account.

Q. Did you owe the butcher \$50?

A. Yes.

Q. Did you owe the man for hay, \$279?

A. Yes.

Q. Did you owe the Madison Furniture Company \$225?

A. I don't know about that amount. I owed them a little.

Q. Did you owe Trunkler Dorman \$130 for merchandise?

A. A small amount, but not \$130.

Q. Did you owe the City Store \$185 for groceries?

A. No; that is a cultivator; it includes tools.

Q. Did you owe the Railroad Company for ties \$10, or thereabouts?

A. Thereabouts. As a matter of fact it is half of that amount. [118]

Q. Did you owe the Sloane Furniture Company?

A. I did, at that time.

Q. \$351.69?

A. I think I did, at that time.

Q. You owed Sherman Clay for a piano which was taken away?

A. It was not taken away. I owed them a balance of payment.

The COURT.—Q. Had you received any returns that year at all on your crop?

A. No. Small advances were made on the base payment.

(Testimony of Frederick Genn Bromley.)

Q. You never had received any account from them? A. No, not yet.

Q. Have you inquired from the two canneries as to the values of the crops?

A. Several times.

Mr. SCHLESINGER.—Q. You verified this complaint, did you not? You swore this complaint, and swore to it?

A. Yes. No man knows the value of those crops, not even to-day. The Prune Growers Association for the crop of 1920,—nobody knows what it will realize, net.

Q. Let me call your attention to this paragraph of this complaint. On page 4, line 28, you have made this allegation:

“That with the knowledge and consent of defendants plaintiff delivered to the California Co-operative Canneries from the crops raised by him on said fruit ranch and at various times during the late summer and early fall of the year 1920, 5545 pounds of pears, 816 pounds of free peaches; 170 pounds of cling peaches and 23,158 pounds of apricots, and immediately and in person notified said California Co-operative Canneries that sixty per cent of all of said fruit and the proceeds of sale thereof belonging to and should be credited to defendants, and such credit was immediately thereupon given by said canneries to said defendants; [119] that the value of all of said fruit was and is not less than the

(Testimony of Frederick Genn Bromley.)

sum of \$5,000, and the said sixty per cent credit thereof to be applied by defendants to the balance of said principal and unpaid interest under said contract is the sum of \$3,000."

Q. Where did you get those figures from?

A. The approximate values of the fruit given out and expected at that time when the market was very much higher than it was towards the end of the year. You know perhaps, as well as I do, —I do not know very much about it, but all that year prices were falling. At the time we got our final statement we got very much less than we anticipated.

Q. You filed this complaint in this court on the 27th day of June, 1921?

A. If you have it in front of you, I presume that is correct.

Q. You say therein: "And the said sixty per cent credit thereof to be applied by defendants to the balance of said principal and unpaid interest under said contract is the sum of \$3,000." Did you have any figures in your possession from the Canneries Company to justify that statement?

A. Those figures are only made providing the fruit realizes the value as according to the market report of prices on that date. You cannot judge that with the fluctuation of fruit prices. (Tr., pp. 70-73.)

(Testimony of Frederick Genn Bromley.)

On redirect examination the witness testified as follows:

I set traps to eradicate gophers and other rodents on the orchard. I had from four to six dozen traps constantly at work, put poison in the holes. I spent days, and had two boys for two or three weeks shooting squirrels, and poisoning them. I did everything that was possible. The traps were examined and reset [120] every day, every morning.

Q. In reference to this tractor; there is a tractor mentioned in that contract, is there not?

A. Yes.

Q. That tractor is valued at \$1,500, is it not, by Mr. Warren?

A. I think \$1,000,—I am not sure.

Q. At any rate, Mr. Warren knew when you sold that tractor? A. Yes.

Q. Did he know it was sold to a junkman?

A. Yes.

Q. How much did you get for it?

A. Between \$30 and \$40.

Q. That was an old tractor? A. Yes.

Q. That broke down when?

A. The first day it was used.

Q. When did you sell it?

A. About six or seven months afterwards.

Q. I find an entry in your diary that you paid for the Fageol tractor on the 17th of January, 1920?

A. Yes; if it is in the diary, it is correct.

Q. Then you sold the old tractor? A. Yes.

(Testimony of Frederick Genn Bromley.)

(Witness continuing:) After the first of October, when I came to San Francisco, I visited the ranch repeatedly to see that everything was going on satisfactorily. Savio remained there until the end of November; he worked until the end of November. After that he was still on the ranch until he removed his furniture out of his house, **about** a week or ten days after that date. (Tr., pp. 73-75.)

Mr. BARENDT.—Q. You swore to this complaint in June. Is it a fact that on October 10, 1921, you received your first statement from the California Canneries?

A. The final statement, I think. [121]

Q. Didn't you also receive some time prior to that a statement from the Prune and Apricot Association, saying there would be later a payment to you?

A. Yes.

Mr. BARENDT.—It goes to show that no one knows what they are getting for fruit.

The COURT.—Q. Does this statement of the Prune and Apricot Growers Association of November, 1921, disclose the amount that they paid over to the defendants of their 60 per cent?

A. The statement was made during the year.

Q. How much?

Mr. BARENDT.—The total payments are in cash, \$2,064, that the defendants received prior to their entry.

The WITNESS.—That is not the final statement. Those are advances.

(Testimony of Frederick Genn Bromley.)

The COURT.—I am asking you if their statement did not disclose how much advances had been received by the defendants from their 60 per cent of the crop. You say over \$2,000?

Mr. BARENDT.—Yes; from all the crops together, over \$2,000.

The COURT.—Prior to the time they re-entered?

Mr. BARENDT.—Yes.

The COURT.—How much was the annual interest?

Mr. BARENDT.—\$2,700. It is admitted in the answer, your Honor. In the answer they give a table of the moneys they received. The last date is November 30, 1920; up to that time they received \$2,064; therefore there was only \$636 of interest approximately due and owing.

The COURT.—Did that close out the account of that year's crop?

Mr. BARENDT.—There was more to come. There were still [122] accounts from the Prune and Apricot Growers Association, as well as accounts from the California Canneries. When those figures were actually received, then Mr. Warren's right accrued to come and say: "Mr. Bromley, I have only received \$2,500; there is further interest due." That was the only time, and the first time they had a right to say, "If you do not pay up, we have a right to re-enter."

Mr. SCHLESINGER.—Q. Did you receive statements of account from the Canneries Company in this form?

(Testimony of Frederick Genn Bromley.)

A. No, I have not seen this.

Q. Did you receive any statements from the Canneries Company? A. I think not.

Q. Or from the Prune and Apricot Growers Association?

A. I think I had a statement from the California Co-operative but not from the Prune Growers Association, because they will send out a statement when the account is closed; they have not yet closed.

Q. The only payments you have made to the defendants here on this \$55,000 purchase was your first payment, outside of any crops, to which they would have been entitled from the fruit contracts with the Canneries: Is that right?

A. That is where their payments were to come from.

The COURT.—The contract does not call for any money payments until the end of five years; in the meantime 60 per cent of the crops goes to them.

Mr. SCHLESINGER.—Except taxes. (Tr., pp. 75-77.)

Testimony of Harry Postlethwaite, for Plaintiff.

HARRY POSTLETHWAITE, a witness called for the plaintiff, being first duly sworn, testified on his direct examination as [123] follows:

I resided in San Jose a little over thirty-three years. I am a fruit-grower and have been such over 33 years. I know Mr. Bromley. I think I have known him since the Spring of 1919. I do

(Testimony of Harry Postlethwaite.)

not know Mr. Warren or Mrs. Warren. I owned orchards and act as trustee for a big orchard in Santa Clara, and have for a number of years, for the last twenty-two years I have ranched in Tulare County. I do not own any orchard in Santa Clara County to-day. I have known for 27 or 28 years the ranch which is the subject matter of this litigation. I was on the ranch quite a number of times when it belonged to Dr. Lucern. I have been on the ranch many times since the first day of December, 1919. According to my memorandum I was there after the first day of December, 1919, on January 7th, the first time after Bromley had it. (Tr., pp. 77, 78.)

Q. What was the general condition of the property at that time in your view, as an experienced orchardist?

A. The orchard and trees were simply in a rotten condition; the place looked as though it had not been cared for, for years.

(Witness continuing:) I might say the trees were falling to pieces with rot, a great many of the old trees, the trunks were absolutely rotten; once or twice I put my hand right through the trunk, and told Mr. Bromley to shake hands with me; and the young trees that were interset among the old trees, I made the remark they were practically dead, giving the reason that they had not been covered to protect them from insects; the borers got in, and they looked as though they were practically dead; they were so stunted. They were

(Testimony of Harry Postlethwaite.)

mostly apricots. I saw the walnut trees. I think that most of them were either dead or dying. They were young trees not bearing. [124]

Mr. BARENDT.—Q. What was the condition of the ground in which they were standing at that time,—had it been broken up?

A. No, I do not think there had been any work there that year.

Q. Had it been plowed up, or was it grass, or weeds, or what?

A. If I remember right, the ground was in the shape to do something to it. There was some ground on the place that looked as though it had not been touched for years, but not exactly on this spot.

(Witness continuing:) I am not sure at that time whether this walnut orchard had been cultivated to some extent or not. The balance of the place had. This was a short time after Bromley went there; I know he did a lot of discing on that place.

Q. What was the condition of the prunes on the northeast corner of the orchard on January 7, 1920?

Mr. SCHLESINGER.—That is objected to as wholly immaterial, irrelevant and incompetent.

A. I can't state exactly. I know there was a certain number of the trees on the place that were in good condition, but the majority were in poor condition; they had been abominably pruned; that was the cause of the rot; where a large limb had been cut off, instead of cutting close to the trunk of

(Testimony of Harry Postlethwaite.)

the tree, to give it a chance to seal up, it had been cut with a great big snag, which gives it a chance to rot.

Mr. BARENDT.—Q. What was the condition of the pear trees?

A. I think the actual living pear trees were better than the majority of other trees; the pruning had been done in a very poor way to produce crops.

Q. Are you familiar with apricot or prune trees?

A. I have had very little experience with pears, actually doing [125] it with my own hands, but with other fruits I have.

Q. What other fruits?

A. Prunes, peaches, apricots, cherries, oranges, but not with walnuts.

Q. Do you, as an expert, consider it necessary to plow an orchard?

A. I do not consider myself an expert.

Q. With your knowledge—

A. (Intg.) I have been successful.

Q. Do you know whether this ranch was double disced?

A. I know it was disced, and disced very deeply; I was out there while it was being done.

(Witness continuing:) Many times I visited the orchard later than January 7, 1920. I went over the ranch a number of times to see what work was being done. I did not see actual water on it. I saw it when it was prepared for water, and when the water came off, I know it was irrigated whenever it could be from the creek. I saw Bromley

(Testimony of Harry Postlethwaite.)

working both the old and the new tractor. I saw the old tractor. I do not think the Bean tractor was ever any good unless it was in the hands of a thorough mechanic. I only know from hearsay from Bromley that it was not very good. I have seen Mr. Bromley work deep furrows, double discing. I know he cultivated the entire ranch. There was a bank he could not cultivate; nobody could plow it with a cultivator; he could not touch it. I would not like to say that during the first portion of the year 1920 there was a shortage of rain and that the heavy rains came in November and December, when the crops were all in.

Mr. BARENDT.—I wish at this time to offer the United States Department of Agriculture Weather Bureau climatological data, just certain portions of it which show the lack of rainfall in San Jose and to show that this was the fourth successive dry [126] year, and that in the early part of the year there was a shortage of rain, and that the heavy rains came in November and December, when he crops were all in.

Mr. SCHLESINGER.—I would like to examine it.

Mr. BARENDT.—Q. Basing your knowledge upon the work done by Mr. Bromley as seen by you, the shortage of rainfall, and the condition of the trees, do you consider that the crop obtained by Mr. Bromley was the best possible, under those circumstances and conditions?

Mr. SCHLESINGER.—Objected to as incompe-

(Testimony of Harry Postlethwaite.)

tent, irrelevant and immaterial, and not within the issues.

The COURT.—What we want to ascertain from this witness is, if he has knowledge of that character of work, whether the work done by Bromley on that place was a good, fair, farmer-like and orchardist character.

Mr. BARENDT.—That is it exactly.

A. At the time Mr. Bromley went on the place he could not make the crop for the next year; the crop was made the summer before; all he could do was to mature and gather what Warren had made the year before.

Q. Did the place look to you as though it was being properly cultivated by Mr. Bromley?

A. Yes; so much so that I told Bromley that I thought he was doing unnecessary work. He was putting more work on it than I thought was necessary in the way of cultivation.

Mr. BARENDT.—Q. Referring once more to this question of plowing: Have you yourself had any experience with apricot growing, where you did not plow at all? A. Yes.

Q. What did you do?

A. Disced and cultivated for three years on a very successful orchard at a place that is about [127] four miles from San Jose.

(Witness continuing:) I cannot tell you the exact date when I was last upon the ranch that is here under discussion. I have a memorandum-book that I put such things down in. During the season of

(Testimony of Harry Postlethwaite.)

1920 I imagine I was there six or seven or eight times during the winter and summer. I know I was there when they were picking grapes, which must have been during the fall. I think it was probably September. I have most of the notes when I was there,—six or seven times, but no more. My experience as an orchardist I don't think it is necessary to do any work on an orchard of that character in the months of December and January in the way of cultivation or pruning. Of course, a lot of men do prune at that time to avoid doing it after, and when the trees are old, I prefer pruning later; the young trees should be pruned. I think the main thing to do is to look after the gophers once a week and things like that; if there should be any water coming down to take advantage of it. The orchard look to me as though it was simply ridden with gophers and squirrels. The trees must have been girdled the season before; there were a number of trees that had been girdled and I showed them to him. On January 7, 1920, I showed him a number of trees that had been girdled, where the gophers had gone around the trunk of the tree, and partially or thoroughly taken the bark off. In most cases it does kill the tree. I have no idea how many trees had been injured in that way.

Q. Did you ever see any gopher traps on that place?

A. I know he told me he had a number of gopher traps he had put down, and the amount he had killed. It looked to me it was impossible to get rid of them.

(Testimony of Harry Postlethwaite.)

Q. There were so many?

A. I think it was the worst [128] place I ever saw for gophers. (Tr., pp. 79-85.)

On cross-examination said witness testified as follows:

I have never owned, or worked or cultivated any ranch within the immediate vicinity of the ranch in question. For 22 years I have raised oranges; for 18 or 22 years deciduous fruits in Santa Clara County. I reside in San Jose some distance from this property. This property is near Cupertino, near Saratoga, between Saratoga and Los Gatos.

Q. You and Mr. Bromley have been very friendly, and are to-day good friends?

A. We have been friends, but he has relied upon me a great deal for advice for the ranch,—that is our main friendship.

Q. Before making this contract of purchase did he consult with you about it?

A. No; he wanted to, but I was ill.

Q. You did not go on the ranch, or talk with him until a month after he had agreed to purchase it?

A. On the 7th day of January, when I was first on the ranch.

Q. Do you know anything about the history of that ranch as to production in prior years?

A. Not of very recent years.

Q. Did you know it in the year preceding the year of Mr. Bromley's agreement to purchase, that that ranch produced nearly \$19,000 in crops?

(Testimony of Harry Postlethwaite.)

A. I heard that. I was very much astonished except for one reason.

The COURT.—Q. What was the one reason?

A. The year before that, 1919, in September or early in August, [129] there was 6¼ inches of rain fell in two days; I have a friend who has an orchard very close to the Warren orchard, and I believe if it had not been for that rain that orchard would have died; but they got one of the best crops they ever got, it was caused by that rain. If the Warrens did get that much I think it was caused by the same reason. If sick trees get a little high life they bud and do a little spurt that they are not accustomed to.

Mr. SCHLESINGER.—Q. You were on that ranch how many times after Bromley purchased it, up to the time he left there?

A. I could not tell you, except I may have been there a dozen times. I have notes when I was there six times.

Q. During each of your visits you had occasion to make up your mind that the orchard there, to use your own expression, was “rotten”?

A. I made that the first time I went out there.

The COURT.—Q. Did you make any inspection of the condition of the trees?

A. It was impossible to improve the condition of some of those trees. (Tr., pp. 85–87.)

(Witness continuing:) I did not count the trees. On the 7th of January, we went out there after lunch; it did not take very long to drive out; we

(Testimony of Harry Postlethwaite.)

spent the whole afternoon there. I had not been on that place since Colonel Moore had it.

Q. Are you prepared to tell the Court as to the amount of plowing done by Mr. Bromley during his occupancy?

A. I don't know as any plowing was done at all, except what I heard Bromley say. He talked with me on the question of plowing; he did not think it was necessary.

Q. Are you able to state to the Court as to what amount of double discing he had done? [130]

A. No. I did not keep tab of the discing he had done; but I told him he was doing more than was necessary.

The COURT.—Q. That was from your observation? A. That was from my observation, yes.

(Witness continuing:) The last time I was on that ranch was when they were harvesting the crops.

Mr. SCHLESINGER.—Q. Did you find the trees rather poorly pruned during that time?

A. The trees had been very, very poorly pruned for a number of years.

Q. They were badly pruned at the time of your inspection, were they?

A. I told Mr. Bromley whoever was pruning the trees was doing a very poor job.

Q. What did you have to say to him about the pruning of the pear trees?

A. I cannot remember whether the pear trees had been pruned; the pear trees had been pruned in a very poor way in years gone by.

(Testimony of Harry Postlethwaite.)

Q. You found a large number of trees that had been girdled by gophers?

A. Quite a number. I did not examine every tree.

Q. Can you estimate the number? A. No.

Q. Did Mr. Bromley state to you on January 7th that he was dissatisfied with his purchase?

A. No, he was very optimistic.

Q. Did that optimism of his continue up to your last visit in September or October? A. No.

Q. Did he tell you he expected to get from that orchard a sufficient amount of money during that year to pay a considerable part of the purchase price?

A. While the fruit was on the trees he was optimistic; he could see tons where [131] I could only see pounds.

Q. Did he discuss with you the proposition that \$19,000 in crops had been taken off the prior year?

A. He told me that he was told that \$19,000 was taken off there.

(Witness continuing:) I am unable to state just what amount of work Bromley had done at that place, it would be impossible to state the exact amount. It seemed to me he did work, more work, than you ever expected or imagined to be done.

Q. Did you ever, in your experience as an orchardist, ever hear of any man leaving a place without himself or foreman, or other man in charge for two months at any period of the year?

A. Yes. I did it myself for three months.

(Testimony of Harry Postlethwaite.)

Q. You have done that yourself? A. Yes.

Q. Around San Jose? A. Yes.

Q. Where is this place?

A. On the highway, near Lawrence Station.

Q. Where you had prunes and apricots growing?

A. Yes; during the months of from the middle of October to about January 1st nobody was on that place at all. I went down once a week myself to look for gophers.

Q. Do you say that with a ranch of this kind, with the existing weather conditions, the character of the soil and age of the trees, and the climatic conditions, that it would be prudent and farmer-like for a man to leave the property without anyone in charge for the months of December and January, and not return until February?

A. I consider it was a business-like thing to do.
(Tr., pp. 87-89.)

(Witness continuing:) There is nothing to be done on the ranch in November and December that cannot be done later, [132] except for the gophers and squirrels;—where you cannot get water when you want it. A man can prune during the months of December and January, and he can prune during February and March just as well. The land I had reference to at Lawrence Station is 50 per cent loam, and 50 per cent gravel, particularly light soil.

Q. Is it similar soil to what we have here on the Warren Ranch?

A. No, it is a darn sight better, except that piece on the flat.

(Testimony of Harry Postlethwaite.)

Q. You have known Mr. Warren a good many years?

A. I don't know anything about Mr. Warren.

Q. He has lived in that county all his life?

A. I never heard of him.

Q. You do not regard yourself as an expert in the matter of lands in this locality—in the vicinity of the Warren Ranch?

A. I do; four years ago I appraised land for Balfour Guthrie for mortgages, and they made a good many loans.

Q. Near this land?

A. Not exactly near this land; on the Bay there.

(Witness continuing:) I noticed the walnut trees were either dead or dying. I don't know what the condition of the walnut trees were in the year preceding the occupancy of Bromley, excepting I can imagine the condition of the place, by the condition of the trees. I do not know it by any inspection in the previous year. I do not know anything about the production of the years preceding. I know, as a matter of fact, that Mr. Bromley was not an orchardist and never farmed in his life before. I understand he was told that he could get enough money out of the crop to practically pay a very large portion of the purchase price. (Tr., pp. 90, 91.) [133]

The witness HARRY POSTLETHWAITE was recalled for further direct examination.

Mr. BARENDT.—Q. Mr. Postlethwaite, you were

(Testimony of Harry Postlethwaite.)

asked on the stand yesterday whether you know Mrs. Warren, and you said "No." A. Yes.

Q. Did you ever meet Mrs. Warren?

A. I would like to contradict what I did say.

(Witness continuing:) I said I did not know her. I stated wrongly. Mr. Wilcox told me who she was before she was married. I met her as a girl. The planting season for new trees depends on the season of the year. I mean climatic conditions; it is usually January, February, or early in March. I never planted aciduous fruits between July and December. I refreshed my recollection with reference to that little acre and a half of walnut trees as to their condition. I think I was asked about its condition; the first time I went over there; I think I answered I did not notice anything particular. The second time I did. The land was somewhat like a very hard cement; it was perfectly hard. I don't remember noticing that the first time I went over it. Yes, I know the prices very well that were paid for prune, apricots and peaches in the years 1919 and 1920. The prices in 1919 were considerably higher on prunes, and somewhat higher on apricots and things like that than in 1920. In 1920 the selling price opened at a pretty good high price, but all the canneries lost money, that put down that price, and the co-operative canneries later could not make those high returns. In the year 1920, I don't remember the conditions of the different months of the rain like that. I have a little note that I looked up last night. When I was at Judge Lieb's he told me that

(Testimony of Harry Postlethwaite.)

he had never known the wells to be as low as they were that year; that he was [134] having to buy water from some other source to fill his water requirements for domestic water; he had so little water that he had to buy to supplement his own; that was August 22, Sunday. I have no recollection as to the seasonal rains or their absence. I know it was a dry year. I cannot answer the question accurately the way it was asked. In general, I know it was a very dry year. (Tr., pp. 91-94.)

On cross-examination of said witness, said witness testified as follows:

Mr. SCHLESINGER.—Q. I was not quite clear with reference to the testimony with respect to what you found on this ranch on January 7, 1920, as to the number of dead trees?

A. We spent about three and one-half hours probably, going over them.

Q. You did find a large number of dead trees?

A. Quite a number, dead and dying.

Q. Those trees were prunes and apricots?

A. May I take that back? Those young trees, while they had not budded, it is impossible to say they were actually dead, but they looked dead.

Q. Which trees were those?

A. The young trees interplanted among the old trees.

Mr. SCHLESINGER.—Q. You did find a large number of dead trees on that ranch on January 7th?

A. Trees that were apparently dead.

(Testimony of Harry Postlethwaite.)

(Witness continuing:) I am not able to estimate the number. Right where there were young trees planted there were some old trees too; a great many apparently dead, and a great many dying. There are two opinions about pruning apricots; some [135] people prune directly the crop is on, and others do not prune until the winter or early spring. I cannot state what the custom in that particular neighborhood is.

Q. I will ask you this: Considering the extent of this land, the character of the trees planted thereon, what length of time do you think would be necessary to prune in a proper and farmer-like manner?

A. I cannot say. I know the less pruning you do on prunes the better off it would be. On apricots I think it takes quite a time to prune.

Q. What would you say as to the number of men to be employed for that purpose, considering the extent of the land, and the number of trees thereon, their age and other conditions which an orchardist would take into consideration?

A. That is a very hard question to answer.

Mr. BARENDT.—Q. When you were there on January 7, 1920, was any pruning going on?

A. Yes.

Q. Who was doing it? A. A Japanese.

Q. Did you see how he was doing the pruning?

A. Yes.

Q. Was it being properly done?

A. I would not think it was done properly. It

(Testimony of Harry Postlethwaite.)

was done apparently in the same way that pruning had been done for a number of years there.

Mr. BARENDT.—That is the case for the plaintiff. (Tr., pp. 94–97.) [136]

Thereupon a motion for a nonsuit was made on behalf of the defendants, which motion was and is as follows:

On behalf of both of the defendants in this case, the defendants move for a nonsuit upon the ground that the testimony on behalf of the plaintiff fails to show performance on his part of all the acts and conditions of the contract required to be performed by him before he is entitled to maintain an action to recover damages on the contract.

The evidence fails to show that he replanted in the spring of 1920, or at all, any trees in lieu of the dead trees which existed upon the orchard. The evidence affirmatively shows that he failed to do that particular thing with respect to the removal of dead trees and the planting of new ones as required by the contract. The evidence affirmatively shows that he has at no time paid his interest due upon the contract. It further shows that he has at no time offered to pay the interest or any portion thereof. The evidence affirmatively shows that he has at no time paid the taxes upon the land, which, under the contract, he was obligated to pay. It is true that the evidence does show, by his own testimony, that he wrote to the tax collector and asked for an extension of time in which to make the payment of

taxes, but there is nothing in this complaint asking that he be excused from performance for an excusable reason, and a variety of excuses, if he had any, would not satisfy the complaint, which alleges full performance. I am confining myself to the evidence of the plaintiff which appears, up to this time, without conflict with respect to these particular matters.

In this connection, if your Honor please, I would like to direct your attention to the agreement in this case upon which the plaintiff has declared. I have an epitome of it here: The [137] agreement is dated December 1st, 1919, and it is annexed to the complaint filed in this court as Exhibit "A."

The first clause of the agreement is: That the parties of the first part agree to sell and the party of the second part agrees to buy and pay for on the terms and conditions and subject to the reservations herein provided,—then follows a description of the property.

Paragraph 2: That the full purchase price for said property shall be the sum of \$51,000, lawful money of the United States of America, of which the sum of \$6,000 is to be paid upon delivery and execution of this agreement. That was paid. The balance of the purchase price, to wit, \$45,000 shall be paid in lawful money of the United States of America on or before five years from this date, together with interest thereon from date until paid at the rate of six per cent per annum, payable annually, and if not paid as it becomes due, it shall

be added to the principal, become a part thereof, and thereafter bear interest at the same rate.

The COURT.—The contract provides that 60 per cent of the annual crops shall be applied, first, to the interest, and then to the principal. The plaintiff would not be in default on paying the balance of the purchase money, in complying with the provision for the allocation of 60 per cent of the crops to the defendants, if there had remained a very considerable portion at the end of five years, provided he paid it then. Of course, the contract contemplates that the interest should be kept up.

Mr. SCHLESINGER.—Yes. The first installment of interest due on that contract would have been on the first day of December, 1920. Mr. Bromley testified he made no payments of any kind or character, except the first payment of \$6,000 on account of prin— [138]

The COURT.—You are mistaken. His testimony tends to show that he complied with the terms of the contract as to the 60 per cent of the crops, or instructed the Association and cannery to give to the defendants 60 per cent of the crop, to be applied on the interest and principal.

Mr. SCHLESINGER.—The contract does read that way; but if that were the intention of the contract he would not have to pay any interest at all.

The COURT.—You do not understand me. You said he had paid nothing on the interest. I say he had done what the contract provided. Now, it appears from his testimony, up to the present time

it has not yet been determined what the results from that crop actually were.

Mr. SCHLESINGER.—The point we make with respect to the interest is Clause 3 construed in connection with Clause 7. Clause 7 of the contract does not in anywise modify or change Clause 3 respecting interest. In other words, Clause 7 did not release him in any way from paying that interest on December 1, 1920.

The COURT.—I could not construe the contract in that way. Where in carrying out a contract of that kind, the party does what the contract says shall be done, and owing to the conditions which grow out of that method, the receipts are delayed, as in this instance, through the method of harvesting the crop, with the knowledge and acquiescence of the other party, the returns of the crop are delayed, he has performed his contract in that respect.

Mr. SCHLESINGER.—The clause says, and the portion which shall go to the party of the first part,—meaning Warren's 60 per cent,—shall be by them credited to unpaid interest. The interest is to be liquidated first, and the balance applied on the principal. I take it that cannot be construed into a postponement of the obligation on the part of Mr. Bromley to have paid that annually, as that clause of the contract provided. [139]

The COURT.—But the contract does not so provide.

Mr. SCHLESINGER.—Very well. Then I will pass to still another point. I don't think it would be pertinent to cite the decision of Judge Welsh

upon that point, it being the opinion of the trial judge in the Superior Court.

The COURT.—His opinion is entitled to the very highest respect, but I have got to construe this contract for myself.

Mr. SCHLESINGER.—That does not do away with the consideration of the case, or the testimony in the case.

Now, if your Honor please, passing from that point, it does not appear that at any time has Mr. Bromley offered to pay any interest; if upon an accounting it appear that interest is due, it does not appear that he has either asked for an accounting from the Canneries Company, and under that contract, “the party of the second part will notify the parties of the first part that he is ready to sell and state the price at which he is willing to sell, and if said price is the market price for the fruit at that time, the parties hereto agree to consent to the sale of said fruit and shall thereupon sell said fruit in the joint names of the parties of the first part and the party of the second part in the proportion of 60 per cent in the name of the parties of the first part and 40 per cent in the name of the party of the second part, and the portion which shall go to the parties of the first part shall be by them credited on unpaid interest and the balance on the principal hereof as herein agreed.

It appears from this testimony that there was not sufficient from the crops to have paid the interest, or, indeed, any part of the interest, or the principal. If that does not appear from the testimony, then,

again, plaintiff is absolutely [140] in default as failing to show that he has offered to pay the unpaid interest.

The COURT.—Very clearly, under this contract, in order to put plaintiff in default for interest or principal, such as to justify the defendants in undertaking to set aside the contract, it must appear that he was put in default by a demand showing specifically what their claim was, as to his failure to perform the contract.

Mr. SCHLESINGER.—There is no allegation that he has performed the contract.

The COURT.—There is evidence here, which must be taken as proving what it tends to show for the purposes of a motion for nonsuit, which does tend to show he complied with the contract.

Mr. SCHLESINGER.—Now, on the proposition of taxes: Clause 10 provides: “The party of the second part agrees to pay all taxes and assessments of whatever description which shall be hereafter assessed against said property until the payment of the full purchase price herein agreed to be paid.” The testimony shows without dispute that he did not pay taxes, but simply requested an extension of time in which to pay them.

The COURT.—Look at Paragraph 15 of the contract. You will see what the effect of the failure on his part is,—it does not forfeit the contract at all. It does not say: Upon failure to pay that the contract shall thereupon be forfeited, and the other party may re-enter.

Mr. SCHLESINGER.—Section 16 provides: “That in the event said party of the second part fails to perform any of the terms and conditions of this agreement, or shall make default in any payment of principal or interest, then all of the rights of [141] the party of the second part hereto shall terminate and all payments theretofore made shall be retained by the said parties of the first part and treated as compensation for the rental and occupancy of the said land up to the time of such default.

The evidence in this case clearly shows that he had failed to make that payment. When he failed to make the payment, for our protection, to prevent liens being put upon the property, under that clause, we were entitled to do that. That did not relieve him from his primary obligation to pay those taxes.

(Citing authorities: *Glock vs. Howard & Wilson Colony Co.* 123 Cal. 4.)

Of course, your Honor, where one is entitled to a conveyance, and has paid his price, then the measure of damages is the price he has paid. But in this case he is not entitled to a conveyance, no one has denied him a conveyance, therefore, what possible damage can he have sustained by the act of this so-called forcible entry, made at a time when there was no one upon the [142] place, made at a time when according to the testimony of Bromley he was tired of the bargain because he had gotten “a white elephant,” as he testified.

(Citing authorities: *Hansbrough vs. Peck*, 72 U. S. 496.)

When we take this contract into consideration, the small amount paid down,—a very small amount considering the purchase price to be ultimately paid, that this man,—owing to his condition, which should have great weight upon this motion,—did not replant trees. There were dead trees there, the contract recognized that fact. He went into possession the 1st of December, 1919, and remained until the 8th of October, 1920, and he did not do a blessed thing with respect to that portion of the contract.

The COURT.—He remained there later than that. All he removed was some of his furniture; he had a foreman there.

Mr. SCHLESINGER.—*If had* a foreman there, he did not replant those trees, which was made an important condition of this favorable contract; he did not do it. The dead trees were there according to Postlethwaite, and they were in very poor condition. He was allowed to go in there on very favorable terms, and agreed to do these things; when he did not do these things, which required the expenditure of time and money, he is clearly in default there, for which he has not offered a single excuse. The fact is, Mr. Bromley did not do that, he did not replant those trees. The fact also appears in evidence he did not prune the orchard. Your Honor cannot relieve him of that default, any more than you could relieve him from any other default, because he had not asked relief. So, I say, we are confronted with one consistent default.

(Citing authorities.) [143]

We have this analogous proposition here. This man does not do a thing. He does not say that he wants the land, or, on the contrary, that he does not want it. If he has any damage, what is his damage? It may be for the waste committed by Warren. What waste has Warren committed? He has done nothing upon that place to the detriment of the delinquent vendee. It is only in the case of mutual rescission where a recovery of the purchase price paid can be, or a part of it, recovered back.

(*Glock vs. Howard & Wilson Colony Co.*, 123 Cal. 4; *Hansbrough vs. Peck*, 72 U. S. 497.)

Under our contract, all payments made were regarded as equivalent to rent. Mr. Bromley, under that authority, is certainly out, because to your Honor in considering the testimony, it must be quite plain that at least this occurred,—of course I realize I have to accept his testimony as true upon this motion,—that at least he permitted Mr. Warren to go into possession of that land. Of course, when I tried to pin him down into the admission that Mr. Warren was to take care of the land in a farmer-like way he denied it. He said he was to go in there and look after the stock,—consisting of one cow and one horse and a few chickens. At least, it would not make any difference for what purpose Mr. Warren went in there; he did not go in there surreptitiously; he did not oust anybody from the place; it was a lawful and peaceful entry, and Mr. Bromley still had the right to tender performance, and

to have gone to Warren and stated: "Yes, I will pay the taxes; I will pay the interest, I will eradicate the dead trees, I will replant new trees, I will prune the orchard, I will do all those things." But he has never offered to do it. He never made the slightest offer. Now, why has he not made it? I have frequently heard your Honor say where there is the slightest [144] suspicion of fraud you are anxious to have the facts divulged. And what are the facts?

This man went to San Jose, apparently a stranger; he is a good talker; sometimes it is a misfortune that a man is not a good talker, but it has been an observation of mine in trying cases that a glib talker will assume a very convincing manner,—Mr. Bromley is a good talker, if he had been as successful a farmer as he is a borrower this complaint would not be here. Here is what occurred: He could not pay his foreman. He admits that he owes him \$350, and the foreman filed a complaint with the Labor Commissioner. Of course, he said he sent him there. He owed the butcher, the baker and the candlestick-maker. Here is his testimony:

"Q. To whom did you have reference to when you said you were discharging the man? A. Savio.

Q. You had no one else there but Savio?

A. No.

Q. Was anybody in occupancy of that place on December 7, 1920?

A. Not to my knowledge.

Q. Was there anyone in occupancy of that place

at any time between December 1, 1920 and December 8, 1920, to your knowledge?

A. Mr. Warren had access to the house the whole time.

Q. You had moved away nearly all of your furniture? A. Surely.

Q. Between October 9, 1920, and December 8, 1920: Isn't that a fact?

A. Yes, certainly. What was not necessary for that house I had in my house in San Francisco.

Q. You know that ranch needs care, and needs a man to run it? A. It needs care, yes.

Q. On July 26, 1920, did you leave with Elmer Brothers an order for certain trees for replanting on that ranch? [145] A. 300 trees, I believe.

Q. In other words, you wanted to comply with your contract concerning replanting?

A. Surely.

Q. Did you subsequently, on the 20th day of October, 1920, cancel that order, stating to the young lady, who was the bookkeeper there, that you wanted to cancel the order because you no longer had any use for the trees, as you intended to leave the country,—answer yes or no?"

As a matter of fact, I showed Mr. Barendt a card showing the cancellation.

Mr. BARENDT.—I did not admit anything on that card.

Mr. SCHLESINGER.—The fact remains that he did violate his obligation to replant trees; he gave an order for trees, and then cancelled it.

When he was asked about a conversation had with Mr. Brooks he testified as follows:

“Q. Did you in the fall of 1920, state to Mr. Brooks, at his office, or rather at the office of the California Prune and Apricot Association, Incorporated, in San Jose, you and Mr. Brooks being present, state to him in substance that because of the circumstances of your inability to raise certain funds you expected to give up the ranch, and leave for some northern country,—or words to that effect?

“A. No. I had a few conversations with people in San Jose, officials whom I met, and even meet to-day, and told them the orchard was not a profitable investment; that I meant to go through with my contract, but I should leave the place in the hands of a foreman, visiting it frequently, but would also follow my previous business pursuits.”

Then later, he testified he considered the place a “white elephant.” [146]

When he was asked about a conversation with the Warrens in which he said that he had no money to pay the balance of unpaid interest due, or to care for the property, that he was going to discharge his man because he could not pay his wages, and that he owed him a large sum of money, and that he would not do anything on the farm until February, if defendants wanted to care for the ranch they must do it themselves, he testified:

Q. Did you see them on that occasion?

A. Yes. This probably transpired at the time,—that I was owing my man his wages; that I could not pay him; he would be paid later on; he was

leaving me to find work. I also told them that all the work necessary to be done was finished up to the end of February, or would be, and that I had started my business in the city as a means of obtaining sufficient income to keep myself, and also to provide funds for the overhead of that orchard, which was—I believe I used the expression to Mr. Warren—that it was a “white elephant.”

When you take these admissions of Mr. Bromley in conjunction with the admitted fact that he had not paid taxes, has not concerned himself with paying the interest, had not paid his foreman, and even up to this date is head-over-heels in debt for debts he contracted after he made this contract, that he left the place, he permitted Warren to go into possession. He further testified:

“Q. What did you ask Mr. Warren to do for you?

A. Feed my cattle.”

Mr. Warren went in there to feed his cattle; he had a right to be there. Suppose in undertaking to feed his cattle he assumed the voluntary obligation of working the farm, and employing three [147] men at great expense for a month and a half. Suppose he had done that; what is the damage to this man who tenders nothing?

“Q. You had no man in charge of that place during that time? A. No.

The COURT.—Q. They would milk the cows?

A. Yes.

Q. Were they to have the milk? A. Yes.

Q. Were the cows giving milk?

A. Yes,—one cow.

The COURT.—He said he did not ask them to look after the place. He had an arrangement with Mr. Warren to feed the cows and the horses and the chickens, and to take the milk and eggs.”

I do not think that Mr. Bromley can make one horse appear as two or three.

The theory of the plaintiff must be where he seeks to recover money back—there was a mutual rescission,—he relies upon this notice. I want to call attention to the authorities in this state covering this kind of a notice. Here is the notice. (Reads.)

It has been frequently argued that a notice of this kind constitutes a mutual rescission, but the Supreme Court of this state and the Supreme Court of the United States have held otherwise.

(Citing: Pfeiffer vs. Norman, 133 N. W. 97.)

In the latter part of this letter is the word “terminate,” which is not the equivalent to “rescind.”

I want to impress this consideration upon your Honor, if I may: I have a sort of a ranch up in that county. I know a little something about the conditions up there. I know that orchards in that county require the most tender and careful attention in order to make them productive, which we are prepared to show. [148]

As to this proposition of re-entry,—as to Warren’s right: He had the right under the contract, of course, to go there to inspect. We claim that he had the right, under the admitted conversations with Bromley, to go in there and take care of the place, there being no one there; and entirely aside from that, this man was interested in the crops under the

agreement. Under the agreement Mr. Warren had the title of 60 per cent of the crops grown on said orchard each year hereafter during the life of this contract until the same is sold and the proceeds disposed of in the manner provided for in the contract. Here is the situation confronting him; Bromley announces his intention of leaving, leaving on October 8th, and then finally returning three or four or five times, leaving that valuable property entirely unoccupied. Here is Warren who had owned that ranch for a year many years; he found the place practically abandoned. We will show there was no one in charge. Mr. Warren had due him some \$46,-000 in money; he had 60 per cent of the crops due him; he knew of the financial embarrassments of this man throughout the county, especially the fact that he owed the foreman. What was he to do? What would any prudent man have done? Was he to delay going in there day after day and allow that orchard to go to rack and ruin. He did that of which no honest man can complain,—he went in there and did the best he could.

And what, I ask you, are Mr. Bromley's damages under the circumstances, when he does not pay anything, and when he admits that he has not performed one of the conditions of the contract namely, the condition as to removing the dead trees and replanting new ones. According to the testimony of Postlethwaite the trees were dead, and should have been replanted; the orchard was [149] in a horrible condition. Bromley was there for ten months, he could have replanted trees, but he did

not replant any of the trees. That is the situation confronting Mr. Warren, and he had the right to consider that the future would be just exactly as the past. This man told him the place was "a white elephant"; he had been disappointed in it.

Mr. BARENDT.—May it please your Honor: This is not an action for waste, it is not an action for the conveyance of real property. This contract is absolutely at an end. This is an action in implied *assumpsit*.

The COURT.—I understand the theory upon which you are proceeding. As I stated at the outset, the plaintiff had a right to the different courses: He could have sued upon the theory that he had fully performed his contract and the defendants were without right to rescind, and insist upon specific performance, or he could acquiesce in their undertaking to rescind and treat the contract at an end, and sue for the damages resulting therefrom.

Mr. BARENDT.—There is one point here with reference to the planting of trees. Time is the essence of this contract. A man cannot stand by and see another man fail to observe the terms of his contract, and, later, when it is too late, say, "You did not perform." In other words, Warren was on friendly relations with Bromley; he was his next-door neighbor; he knew that Bromley was a greenhorn in this business, and he knew the conditions of the weather, and he knew whether it was a fit time to plant trees, or not. He cannot come here, where he makes no complaint for the performance of any of the terms of this contract, and say he did not do

this, and he did not do that. Therefore, I claim a forfeiture.

The COURT.—I think Mr. Schlesinger ignores some of the [150] cardinal principles which cover transactions of this kind. The plaintiff may have been in default, but it does not yet appear, and it did not appear at the time when the defendants went upon these premises. On a motion of this kind I cannot say that he has made a case which is such as to entitle him to recover in opposition to what may be presented by the defendants. On a motion for nonsuit the Court is bound to take the evidence that has been presented on behalf of the plaintiff as establishing that it tends to prove, in absence of anything to the contrary,—at least as to the payments made by him on this contract. As to the other items it is a different thing. At this time the case presents a situation where the plaintiff's evidence has made a case such as to preclude the Court from granting a nonsuit. Upon the showing made by the plaintiff, whether it shall prevail, or not, when the case is entirely before the court, he is entitled to recover damages resulting from the breach of the contract by the defendants, who re-entered those premises, and took them out of his possession, and undertook to rescind the contract. He has acquiesced in that action, and has resorted to the remedy which the law gives him of seeking damages. The motion for the nonsuit will be denied.

Mr. SCHLESINGER.—We note an exception. (Tr., pp. 98–113.)

Testimony of Charles E. Warren, for Defendants.

CHARLES E. WARREN, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

I reside at Cupertino on the Homestead Road and have resided in Santa Clara County for about 45 years. Mrs. Mabel D. Warren is my wife. I am an orchardist by occupation and have been such about 25 years in Santa Clara County. I certainly know the property involved in this contract. I have known it for [151] eleven years. I farmed that property for about eleven years; one year Mr. Bromley had it; that year I did not farm it. I am familiar with pruning in that orchard. The proper time to prune land, any orchard in Santa Clara, except peaches, prunes and apricots would be when the tree is dormant; that is from November to the 1st of February. In 1920 I lived next door to this property, on the adjoining piece of property. I had occasion to inspect that ranch in the year 1920. Up to October of that year Mr. Bromley was occupying it. I had a conversation with him with respect to caring for the place. I don't know as I told him anything with respect to pruning to do, because when he went there the pruning was properly done; but he finished up the coming year. The man he had there was not an orchard man. The place was not plowed in 1920. Part of it was double-disked two or three times, the other part once. About one-half of it was double-disked. Part of the

(Testimony of Charles E. Warren.)

pruning was done in 1919 and part of it was done in 1920. The pruning in 1919 was done under my supervision. The pruning in 1920 was done under the supervision of Mr. Bromley. I re-entered that place on December 8, 1920. (Tr., pp. 113-115.)

Q. State to the Court the circumstances under which you made the re-entry? A. In what way?

Mr. BARENDT.—That is objected to; he is bound by the statement he made as to why he re-entered. It is immaterial under what circumstances he re-entered.

The COURT.—He is showing how he came to go back there. They have a right to show what the grounds were that they re-entered, within the terms of that notice. They cannot be permitted to show he re-entered because he had not paid interest, or had not paid the purchase price, or re-entered because he had not paid taxes. I am talking about the notice. He cannot at this time put [152] the cause of his going upon this land on any other ground except that stated.

Mr. SCHLESINGER.—It says “many of the terms and conditions.” No notice is necessary at all.

The COURT.—You are absolutely wrong in that. (Tr., p. 115.)

I entered the place because it was not being taken care of. There was no one on the place. I had to look after my own interest. I had a conversation with Bromley prior to re-entering. I had one, the last one I had with him was in the latter part of No-

(Testimony of Charles E. Warren.)

vember [153] 1920, and Mr. and Mrs. Warren were present. Mr. Bromley on that occasion said: "I came down to see you if you would not do the work on the place." I says: "Mr. Bromley, I have more work than I can really attend to myself; I am not going out to work for somebody else. He said, "I am going over to tell my man to leave, and if anybody does any work on the place before February, you will have to do it." When I went there in December 8th, I found that the pruning had to be done. The brush had to be picked up, spraying had to be done. You had to remove old trees, so you could replant others, and get the ground into condition for water when it came down the creek for use. I put three men to pruning. I put one man to picking up the brush. In my opinion as an orchardist that work was absolutely necessary. It takes three men to prune 50 acres about a month and a half. My men were employed there about a month and a half. I paid those men. I picked up brush; took trees out, so we could replant, and got the ground in condition so we could begin to irrigate. I removed the trees for planting the other trees, ripped up the ground, preparing it for water; when the water came, I started the pump and was irrigating. I dug up prune and apricot trees. They were girdled with gophers, and I had to take them up. They were dead trees. I replanted over 560 trees. Not to my knowledge had there been any trees replanted or dead trees dug up during the time of Bromley's occupancy. There were no trees replanted. I

(Testimony of Charles E. Warren.)

don't think any dead trees had been dug up. I examined the place. (Tr., pp. 115-118.)

Q. Who paid the taxes on that place for the year 1920?

Mr. BARENDT.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection sustained. [154]

Mr. SCHLESINGER.—Exception.

Mr. SCHLESINGER.—Please state under what circumstances you paid the taxes.

Mr. BARENDT.—Objected to on the same grounds.

The COURT.—Objection sustained.

Mr. SCHLESINGER.—Exception.

Q. Had Mr. Bromley paid taxes for the year 1920? A. He had not.

The COURT.—Q. When did the taxes become due?

A. They became due in November, and delinquent on the 6th of December; that is the first installment.

(Witness continuing:) When I entered the house on that land the house was open; the doors were unlocked; some of the doors were open. There was no one in charge. I have never been paid any interest on the purchase price by Mr. Bromley. (Tr., pp. 118, 119.)

Q. Has he ever offered to pay any balance, or pay any interest or principal?

Mr. BARENDT.—Objected to as incompetent, irrelevant and immaterial; there is no showing there was any interest due.

(Testimony of Charles E. Warren.)

The COURT.—Sustained.

Mr. SCHLESINGER.—Exception.

Q. Have you ever declined to permit Mr. Bromley to pay either the interest, balance or purchase price on re-entering the land?

Mr. BARENDT.—Objected to as incompetent, irrelevant and immaterial. On the further ground it is not necessary for Bromley to make any such offer.

The COURT.—I think so. Objection sustained.

Mr. SCHLESINGER.—Exception. [155]

Q. Has Mr. Bromley ever offered at any time to comply with the terms of the contract?

Mr. BARENDT.—Objected to as too general, and not being specific.

The COURT.—It is clearly so. Sustained.

Mr. SCHLESINGER.—Exception.

(Witness continuing:) I have not heard from Mr. Bromley, either in writing or talked with him personally since the 8th of December, 1920.

Q. Did Mr. Bromley state to you, ask you to go into that place and merely care for the cow and the horse and the chickens?

A. When he told me that I would have to take charge of the place I told him I had more work than I could do; that I did not care to go out to work for anybody. He says: "Then will you take care of my stock for me." I answered him, I did not care to do any work there.

Q. Did you exterminate any of the rodents after you got on the place again? A. I did.

(Testimony of Charles E. Warren.)

Q. What had Bromley done in that respect, if anything?

A. Mr. Bromley caught quite a few gophers after he came; he took me over the place, he came over to my house and got me, and took me down to a patch of about four acres of trees, seven or eight years old, and says: "What is the matter with those trees; they are dying." This was in the summer time. I says: "Those trees are girdled by gophers." He says: "What are gophers?" I says: "You know what a gopher is." We found a hole and I showed him how gophers worked, and they had girdled those trees.

Q. In your opinion as an orchardist, had Bromley farmed that place in a farmer-like or husbandry-like manner? [156]

(Witness continuing:) I did not take one tractor, or any tractor, from the possession of the plaintiff and convert it to my own use.

Q. You are also charged with having taken one bean sprayer: Did you ever convert that to your own use?

A. In doing the work on the place I used it about a week when I went there. I either had to do that or rent one.

Q. Do you know what became of the tractor and bean sprayer?

A. Yes. Artana, of the firm of Artana-Geoffroy Company, came and took the tractor away; the firm of Bean Spray Pump Company took the sprayer away. (Tr., pp. 119-121.)

(Testimony of Charles E. Warren.)

(Witness continuing:) To a certain extent those implements are necessary in farming land of that character. The tractor is used for plowing and cultivating, although you can take care of a place without a tractor. At the present time they are customarily used in farming land of that character, and were used to a certain extent in the year 1920. They are used merely as a substitute for horses. There were three horses there. One horse belonged to Bromley; he brought it there when he came; the other two belonged to the ranch. I have not converted that horse belonging to Bromley to my own use. It was not worth anything. There was about a ton and a half of hay in the barn. He paid \$35.00 a ton for it. I fed the horses and the cow with that hay. When I re-entered the place the cow was so nearly starved she could hardly walk. The riding horse was in fair condition. There were a few chickens on the place what the dogs had not got. I did not convert them to my own use. There were about fifty chickens. I took possession of the chickens. They [157] naturally stayed there on the ranch. I fed them and I bought the feed. There was absolutely no feed for the chickens when I went there. Neither Bromley or anybody else protested against my feeding the chickens or the horse or the cow.

There was no lumber there when I went there belonging to Bromley. There was a cultivator there belonging to him and is still there. It has been there ever since. I did not sell it or try to sell it.

(Testimony of Charles E. Warren.)

He has never asked me for the return of those things. I did not use the cultivator. There was a disc belonging to Mr. Bromley. I did not use it. It is there now. The 300 fruit trays are there. I have not tried to sell them. The 150 forty pound lug boxes are there. The cook-stove is there; I used it. It was in the house connected with the water boiler; when we went there we naturally did not care to tear it out. I have not injured it. The carpet is rolled up in the basement. I did not use the grass rug. It is rolled up in the basement. The ice chest is there. I did not use it. The window screens were tacked on the house and they are still there. The brass curtain rods are still there in the house. The linoleum is still there. The trunk and other personal effects are all there. I did open the trunk and put in a lot of things I found on the floor, and shut the trunk up. I did not take any personal effects from that trunk. (Tr., pp. 121-125.)

I farmed that orchard during the year 1919. I have a memorandum what the production for that year was. It was \$19,700 and some odd dollars. 1919 was a comparatively dry year. I had farmed it for several years. 1919 was an exceptional year.

Mr. SCHLESINGER.—Q. What is the yield this year? A. You mean the returns? [158]

The COURT.—Q. You mean, from last year?

A. That is a conflicting question; we are waiting for our money from the Prune and Apricot As-

(Testimony of Charles E. Warren.)

sociation; from them and from the cannery would amount in the neighborhood of \$7,500.

Q. What were your returns in 1917, in round numbers?

A. I think it was somewhere around \$6,000 in 1917.

Q. So that 1919 was a very exceptional crop?

A. It was an exceptional year. (Tr., pp. 139, 140.)

(Witness continuing:) Before I re-entered the place on December 8th, I had several talks with Savio, the man in charge. The last talk I had with Savio, I think, was about the middle of November. That was the last time I saw him. The conversation was over on the place. Mr. Bromley was in occupancy of that place in December, 1919, and throughout the whole month. He was also in occupancy of the place during January. In fact, during all those months, up to practically the 9th day of October. Sometimes we start to plow it there in February. In February, 1920, Mr. Bromley had not plowed that place. In February, March or April of 1920, Bromley used what we call a disc harrow. It is not the equivalent to plowing. The proper treatment between December and April of 1920 of that soil would be to plow first, then you can use a disc harrow, or disc cultivator after that to keep the ground mixed. The purpose of plowing is to stir up the ground thoroughly and turn it over, so that the ground may be turned up to the sun, to stir up the hard dry fields there, packed from

(Testimony of Charles E. Warren.)

the rains during the winter. The effect of the lack of that on the part of Mr. Bromley on the prune production was that the moisture goes out of the ground when you do not plow that with a cultivator thoroughly, and the fruit does not mature, [159] and the trees suffer very materially. Under this contract I was to receive 60 per cent. (Tr., pp. 140-142.)

Q. How much did the 60 per cent of the fruit sold for the year 1920 amount to? A. \$1,926.35.

(Witness continuing:) When I turned the orchard over to Mr. Bromley it was in first-class condition, and the year prior produced \$19,000.00. When I re-entered the place it was very much neglected. There was more rain in 1919 than there was in 1920. I think there was about fifteen inches of rain in the Valley in the year 1919. There was water available for irrigation for ten years preceding 1920. There was water available for the adequate irrigation of that ranch during the year 1920. Mr. Bromley irrigated about one-third of the place, fairly well, and about one-half of the place,—that is, I should say about one-half of the place was irrigated partially. You might say one-fourth of the place was irrigated fairly well. He did not succeed in raising crops the equal of any produced on similarly situated land. His acts did not increase the value of that land. His acts decreased the value of the land to the extent it will take me five years at least to put it back into the condition it was when he received it. Mr. Bromley between the first of

(Testimony of Charles E. Warren.)

December, 1919, and 8th of December, 1920, had not replanted any trees. The customary time for replanting trees is as soon after the first rains as you can possibly plant them; December or January is generally the month that you should get them in. We had rains in that county after the first of December, 1919. (Tr., pp. 143, 144.)

Q. You said you received 60 per cent. How did you apply that 60 per cent?

Mr. BARENDT.—Objected to as incompetent, irrelevant and [160] immaterial; it does not matter how he applied it.

The COURT.—The contract states that.

Mr. SCHLESINGER.—I want to show the actual amount received, and how he applied it. We claim that the interest had to be paid in any event.

The COURT.—If that is your construction, I cannot agree with that construction. The contract reads: "The balance of said purchase price, to wit, the sum of \$45,000 shall be paid in lawful money of the United States of America on or before five years from this date, together with interest thereon from date until paid at the rate of six per cent per annum, payable annually, and if not paid as it becomes due, it shall be added to the principal, become a part thereof and thereafter bear interest at the same rate." That is the provision which controls the rights of the parties under the contract as to interest. If the annual interest is not all compensated in the way the contract provided, plaintiff would have had a right to pay it out of

(Testimony of Charles E. Warren.)

his own pocket; if it is not paid, the contract provides it shall become a part of the principal and bear interest. It is one of those contracts that is made in view of the exigencies and uncertainties that arise out of agricultural pursuits. The contract provides that the entire balance of \$45,000 shall be paid within five years, but then it provides, and that was for the sellers' security, that annually 60 per cent of the crop shall be allocated to him, and he out of that should first apply it to interest, and then on the principal, but the purchaser is given a lee-way of five years in which to be able to make the price of the property." (Tr., pp. 144, 145.) [161]

On cross-examination the witness testified as follows:

I think the rainfall in 1920 was about twelve inches. [162]

Q. Kindly look at the answer and see what your statement says, on page 5, line 15 to 20.

The COURT.—Read it to him.

Mr. BARENDT.—(Reading:) "Defendants allege that said payments were made in installments upon the dates and in the amounts as follows." The items are set forth, and those items aggregate \$2,064. That was the 60 per cent you received?

A. But there has been a rebate since then.

Q. I will ask you the question, whether you received that amount?

A. Yes, I received that money, but there has been a rebate since then,—“red ink” as we call it.

(Testimony of Charles E. Warren.)

(Witness continuing:) I am a director of the Santa Clara Growers Association. That is a branch of the California Canneries. I do not as such director have representation on the board of the California Canneries. The Santa Clara Growers Association is a local organization; the California Canneries is a state organization. I have no connection whatever with the California Canneries. I have never received any credit since December 18, 1920, for any stock in the California Co-operative Canneries, which had been allotted to Bromley. When a fruit-grower joins a co-operative cannery he agrees to take a certain amount of his payment in stock. The canneries also retain ten per cent of the net value. I don't know that since this suit was commenced Mr. Bromley wrote to the Co-operative Canneries and directed that I should be given credit for both of those amounts, 10 per cent of the new value and 173 shares of stock. I don't know what the value is of 173 shares of stock.

Q. You don't know?

A. No. I would not take it if he did. [163]

Mr. SCHLESINGER.—I move to strike that out, as an attempt to controvert the plain terms of the written contract.

The COURT.—Overruled.

Mr. SCHLESINGER. — Exception. (Tr., pp. 148-150.)

(Witness continuing:) I would not take it. When I joined the cannery I had to take so much stock, yes. I own about 900 shares. I would not want to

(Testimony of Charles E. Warren.)

add 173 shares more to my holdings. I went on Bromley's ranch perhaps once a week. I never on any occasion asked Mr. Bromley not to irrigate his land so much so that I might have water for my ranch.

Q. Was not more water used by Mr. Bromley on his 50 acres than was available for your 75 acres?

Mr. SCHLESINGER.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

Mr. SCHLESINGER.—Exception.

A. Yes, and I wanted him to use it.

(Witness continuing:) I never asked him to shut down. I worked at night. The reason I did not work daytime was that Bromley was using the water daytime, and Bromley would not work at night. The reason I did not run my pump in the daytime was that Bromley was using it.

Q. There was not enough for both of you, day and night?

A. Because my place prepared to use the water, all over the place.

Q. Just now you said you did not use it in the daytime because Bromley was using it?

A. That is true.

Q. If that be the fact, there was not enough water for both of you? A. If I had pipe-lines to use it.

The COURT.—Q. Why couldn't you use it to the extent [164] that you had facilities to use it, why couldn't you use it in the daytime?

(Testimony of Charles E. Warren.)

A. Because I would not ask Bromley to give up water to me.

The COURT.—You just said there was plenty of water, but you did not have facilities to put it on the ground.

A. I watered all I could at night. There was only one little place.

Mr. BARENDT.—Q. You have just now stated that there was plenty of water for both of you, and then I asked you why you did not water your ranch in the daytime, and you said because Bromley was using it. If there was enough water for both of you, why didn't you water in the daytime when Bromley was watering?

A. I did not want to take the water away from that place.

The COURT.—Q. You would not have to, according to your statement there was enough for you and him to use.

(Witness continuing:) I used Mr. Bromley's pump, one night and half a day, in the whole year. I did not have a pump of my own. I bought that place in the fall, and did not get a pump in. I bought a pump to put there, but did not put it in; the only reason I did not put the pump in was I could not get a [165] motor from the P. G. & E. Company to run the pump. I connected up that pump that Bromley had after he left. To irrigate my ranch in 1920 I put in a cement pipe from that pump—I did not irrigate the place, only a small

(Testimony of Charles E. Warren.)

portion, one night and half a day, on the other place.

Q. You never asked Mr. Bromley to let up pumping at night so that you might have water?

A. Mr. Bromley never pumped at night.

Q. I am asking you if you ever asked Mr. Bromley to let up pumping at night so that you could have the water at night?

A. I did not, no sir, never.

(Witness continuing:) I did not say that Mr. Bromley was not pruning the place properly. It was properly pruned in the season of 1920, but not in the latter part of 1920.

Q. What do you mean, "the latter part of 1920"?

A. You must remember that our seasons are from one year to another; in November and December.

Q. November and December? A. 1920.

Q. That is the only time that you claim the place was not properly pruned by Mr. Bromley?

A. Yes.

Q. That is all, absolutely? A. Yes.

Q. Don't you know that many fruit-growers do not prune at all until after the first rains?

A. No, sir, it is absolutely wrong.

Q. Did you ever say anything to Bromley about pruning in November?

A. I spoke to him about the way his man was pruning the trees in November, 1920.

Q. Then he was pruning in 1920?

A. The man was cutting trees to pieces in a most ridiculous manner.

(Testimony of Charles E. Warren.)

Q. He was attempting to prune in 1920?

A. He was [166] attempting.

Q. Do you recall that you just said that no pruning was done in 1920?

A. I do not call it pruning.

The COURT.—I cannot put that construction on your language. You said there was no pruning done in 1920, in November and December.

A. His man would go out and prune a tree here and go off in another part of the orchard and prune a tree, and cut the trees up to pieces. I do not call that pruning. His man admitted to me he did not know anything about orchard work, and Mr. Bromley admitted it to me. (Tr., pp. 150-154.)

(Witness continuing:) Bromley did not leave two sacks of chicken feed. There is no dairy in the house. There is a pantry. They kept milk in there. The milk pans were kept there and I found them there. I did not deliver any milk at that house. I had no reason to go there. I looked after the cow. The cow was milked by my man and under my direction. He used my milk pans. I suppose that we could have used Bromley's. It is not a fact that I was in the habit of leaving that house open, unlocked. The keys were turned over to Mr. Bromley. He did not find the house open. Bromley, if he was there and found the house open, he must have gone into it through a window, or something like that.

Q. You are sure that he did not go in there with Mr. Cruthers, and they walked in together?

(Testimony of Charles E. Warren.)

A. I think the Japanese boy let them in. The Japanese boy always unlocked the house he knows; he knew Mr. Cruthers.

(Witness continuing:) I don't know whether he did so on this occasion or not. There were a few gophers on the place when I sold to Bromley. I had about a dozen traps there. When I [167] went back there in December, I found about three or four traps. I picked these up in trees around in different places in the orchard. I would see them in the tree. I heard what Mr. Postlethwaite said that he had never seen a place so overrun with gophers and rodents as he did that place on January 7, 1920, a month and six days after Mr. Bromley had entered into possession. After I took possession of that property on the 8th of December I did not receive any more hay. I hauled hay from my other place and put it in that barn. It was not delivered by anyone else. It was my own hay. I did not make any use of the disc plow; he did not have a disc plow. A disc harrow or disc cultivator was still there. I did not use the disc harrow nor the disc cultivator. I did not use the tractor. I have a Fageol tractor, the one that Mr. Bromley used to have. I made a deal with the people for that tractor after they took it away. I paid \$1,000 for it. I don't know what Mr. Bromley's dealings with those people were.

The COURT.—Q. In dealing with them for that tractor, didn't you know that Bromley had made some payment?

(Testimony of Charles E. Warren.)

A. They said he had made some payment.

(Witness continuing:) I don't believe the people told me the original cost of the tractor was \$1,575, and there was only \$500 paid on it. There was a cultivator on that ranch. I don't know whether it was paid for by Mr. Bromley or not. It is still there but I do not use it. I used about 50 of the 300 trays and I used a few of the lug boxes. Mr. Bromley told me he had a little ranch in San Jose. I don't know, I am sure whether there were gophers on his ranch. I did not go around to at least half a dozen people in San Jose when Bromley was still on my property and tell them not to give him any credit. I did not go to the Bean Sprayer Company. I never asked Mr. Fannel in the City Store [168] not to give him any credit; I asked him how much Bromley owed him. He went to his books and told me. The way things were going, I wanted to know. (Tr., pp. 154-158.)

Q. Didn't you go to Madison?

Mr. SCHLESINGER.—I think the man is entitled to find out the circumstances of this man. I object to the question as incompetent, irrelevant and immaterial.

The COURT.—Overruled.

Mr. SCHLESINGER.—Exception.

A. Yes, I did go.

(Witness continuing:) When I went into the house there was a rug folded up, laying in the middle of the floor, and a baby buggy. I occupied the

(Testimony of Charles E. Warren.)

house and am occupying it now. I simply moved over.

Q. You went into this house and took possession and never said a word to Mr. Bromley about it?

A. No, sir.

(Witness continuing:) When I saw Mr. Bromley on November 30th, I did not agree to look after his stock. I did not agree to take care of the three houses and one cow during his absence, but I did take care of them. I fed the chickens, and also the two dogs. He had not asked me to do that. He never spoke to me about the dogs. He asked me about the stock. I told him I had all the work I could possibly do. (Tr., pp. 158-160.)

Mr. BARENDT.—Q. You don't remember an answer you gave in answer to that question this morning, and yet you are relating to a conversation with Mr. Bromley that occurred on December 30, 1920?

A. When he asked me to take care of the stock I told him I had [169] all the work I could possibly do, and I did not care to take care of the stock.

Q. Is that the same answer you gave this morning? A. I think so.

Q. Did you in February, 1920, on the ranch of Mr. Bromley's discuss in any shape, manner or form the condition of the trees on that ranch? Late in February or the first week of March, 1920?

A. I do not recall. [170]

Q. Will you say that Mr. Bromley did not say to you, in substance, "These trees look to me sick, dying"; and didn't you spend an hour or so going

(Testimony of Charles E. Warren.)

around with him, looking at the trees, and tell him what you thought of them, and did you then not say to Mr. Bromley this: "Let them stand as they are for this year and get the crop off of them, and then we will see what we will do next year"?

A. That question involves a little explanation.

The COURT.—Answer it.

A. The explanation is this: Part of that orchard is interset, interset, as I explained, with young trees between the rows; before the old ones were removed, when those got up to a certain age those old trees are supposed to come out. That is the conversation I had with Mr. Bromley; I had that conversation. He wanted to rip the whole thing out, and I said, "No."

Mr. BARENDT.—You did have that conversation? A. Yes.

Q. You knew he was a man of no experience?

A. I was directing him.

(Witness continuing:) I did not know it was impossible to buy any new trees at all in the spring of 1920. The \$19,700 was not a net return for the year 1919, but was gross returns. I never told Mr. Bromley that when he bought it. My agent was informed. That was not the basis of the price as far as I know. All these other figures are gross figures in regard to the crops in 1917 and 1918. I have myself literally plowed this ranch since I took hold of it; with a plow, every bit.

Q. There is a difference of opinion between or-

(Testimony of Charles E. Warren.)

chardists as to the relative advantages of double deep furrowing and plowing, is there not? [171]

A. I can answer that by saying that by orchardists it is not considered much of a man that will simply cultivate his place.

The COURT.—Answer the question.

A. There is a difference of opinion, a very great one.

(Witness continuing:) It is customary to plant new trees as soon after the first rains as possible. I know in December, 1920, the creek ran on that place. I will admit that it was a comparatively dry year. There were no rains in January, February and March of 1920; that is when we get most of our rains. (Tr., pp. 160-162)

Q. Did you ever receive the Department of Agriculture Climatological Reports?

A. I probably know as much about water as the people who make those reports.

Q. (Reading:) "More rains fell during the last three months of the year than during the first nine months. The features of the year were the extreme cold of October, the markedly deficient precipitation of January and February; the more important unfavorable features were the deficient precipitation of the first few months of the year, the resultant shortage of irrigation water." Are those statements true, or not? A. It is absolutely wrong.

Q. I show you this Climatological Table—

Mr. SCHLESINGER.—(Intg.) What you just now read applies to Santa Clara Valley?

(Testimony of Charles E. Warren.)

Mr. BARENDT.—To the whole state.

Mr. SCHLESINGER.—Objected to as incompetent, irrelevant and immaterial; it has no application in this case. We are talking about the rainfall of Santa Clara Valley.

The COURT.—The conditions throughout the state [172] generally is more or less remote. Call his attention to the precipitation in Santa Clara Valley.

Mr. BARENDT.—In a table marked: “Monthly and Annual Precipitation for the year 1920, with Departure from the Normal,” it reads: “San Jose, precipitation is 0.10 of an inch, and the Departure is—2.78. A. What did it give February.

Q. February precipitation was 1.04 and the Departure—1.50 inches. Precipitation in March was 3.43, Departure plus .45; April precipitation was .92 of an inch, and the departure from normal was minus .49. In the month of May, precipitation “T,” which means “trace” of rain; departure minus .68. In the month of June it was .21 of an inch precipitation, and the departure, plus .13. July there was no rain at all. August there was no rain at all.

A. We never have rain at that time.

Q. (Contg.) In the month of September it was .02, and the departure was minus .32. In the month of October, 1.71; the departure plus .81, above normal. In November, 1.84, which was .05 less than normal. In December, it was 3.58 inches, and .53 above normal,—

A. (Intg.) December, 1920?

(Testimony of Charles E. Warren.)

Q. (Contg.) Yes; in other words, that table shows heavy precipitation in the last two months of the year.

A. That table is absolutely wrong as to the first part of the year; you will find that those tables do not correspond with different sections of the county.

Q. May I ask you whether I heard you correctly, —you said something about the rainfall in the past ten years?

The COURT.—No; he was speaking about the water in the [173] creek. He said there was plenty any time during the last ten years for irrigation purposes.

The WITNESS.—Every year.

Mr. BARENDT.—Q. Why then was it necessary to go to Mr. Bromley at all?

A. I did not have any pump.

Q. That was the only reason?

A. That is the only reason.

Q. You never complained to Mr. Bromley that he was taking the water away from you? A. No.

The COURT.—Q. Was that pump put in by Bromley on the place?

A. No, sir, I put that pump in five or six years ago. (Tr., pp. 162–165.)

On redirect examination said witness testified as follows:

Mr. SCHLESINGER.—Q. You have been asked by counsel a number of questions concerning any talk with creditors about Mr. Bromley's financial condition: Did you ever have any talk with Mr.

(Testimony of Charles E. Warren.)

Bromley as to his financial worth at or about the time he signed this contract?

Mr. BARENDT.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Sustained.

Mr. SCHLESINGER.—I want to show that this man represented as his worth. I propose to show that he represented he was the owner of a yacht; that he was worth a quarter of a million of dollars, and other property, a man of independent means to creditors, and everybody else up there; that the man came in there as a stranger and represented himself as a man of independent means.

The COURT.—We are here to pass on and determine the [174] rights of the parties under this contract.

Mr. SCHLESINGER.—To prove these things it is absolutely necessary to show that he was a man of absolute irresponsibility; he was not even paying his foreman, the only man he had there.

Exception, please. (Tr., p. 165.)

Testimony of Ralph G. Spencer, for Defendants.

RALPH G. SPENCER, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

I reside in San Jose. I am in charge of the growers and fruit account of the California Co-operative Canneries. Our legal principal office is in San Francisco; our principal business transactions are in San Jose. I held that position with the Co-op-

(Testimony of Ralph G. Spencer.)

erative Canneries in the month of October, 1920. I know Mr. Bromley, the plaintiff here. I knew him during that month. I knew him for eight or nine months prior to that time. I believe I had a conversation with him concerning the Warren ranch in October, 1920. I do not recall definitely whether my assistant was a party to the conversation, but he was present,—his desk is opposite mine,—Mr. Bromley came in,—I will have to state the substance rather than the words; he asked regarding his account, the possibility of additional payment thereon. He had delivered fruit as a member of the Association, to be canned and sold for his account.

Our practice is to make advances as soon as possible; he had had partial returns. I explained that all the advances had been made that could be made at that time, and particularly in view of the fact that under his instructions there was a proportion of it to go to Warren. He said, to my recollection, the substance would be that he was expecting to go to San Francisco [175] and engage in some other business. He expressed disappointment with the outcome of the transaction. I recall the use of the words "white elephant" on that occasion. I recall that he said he expected to leave the place and go in some other occupation where he could make better returns for himself, to meet his requirements. To the best of my recollection it was in the early part of October. (Tr., pp. 126, 127.)

Q. With respect to the returns, when did you

(Testimony of Ralph G. Spencer.)

have the returns ready; when was he advised as to the exact returns of the ranch?

A. You mean the final outcome?

Q. Yes.

A. The account was completed as of April 30, 1921, which is the close of our fiscal year; it was probably a month to five or six weeks at the outside. I cannot recall the precise date, that the grower's voucher, showing the grades and the rate per hundred pounds was issued to all growers, including Mr. Bromley.

Q. At any rate, as early as April 30, 1921, an account had been rendered.

A. The account was as of April 6th.

The COURT.—It was a month or six weeks later?

A. Probably in the month of July, or the latter part of June.

Q. Was it as early as July?

A. It was as early as July. (Tr., pp. 127, 128.)

On cross-examination said witness testified as follows:

We render two accounts, the first is an account of the total returns on fruit, and the second is an abstract of the book account, including the total returns on fruit, against which the [176] charges or payments had been entered, and show an abstract of the book account. The latter sheet was issued on August 3d. The date of the first voucher I cannot give exactly; my recollection is all of them were mailed before the 10th of July.

The COURT.—Q. What is the occasion for that?

(Testimony of Ralph G. Spencer.)

A. That is the final statement of returns, but it does not show the advances. The final one is an abstract of the book account, showing the exact condition of the statement.

Q. Can you from memory state anything about the quantity of fruit that was delivered to you by the plaintiff? Had he instructed you to allocate any of the returns of that fruit to Mr. Warren?

A. Yes, sir, he had.

Q. Had you done that? A. No, sir.

Q. Why didn't you do it? A. Because we had issued advances to Mr. Bromley in advance of any accounting whatever, with Mr. Warren's knowledge.

Q. "With Mr. Warren's knowledge,"—how do you know that?

A. Because Mr. Warren was associated with the cannery.

Q. He was connected with it?

A. He has always been with the Association, although he was not delivering fruit that year. We made those advances on estimates; in the final account, the advances made to Bromley were in excess of what would have been coming to him.

Q. How much finally came to Mr. Warren? Mr. Warren stated he never had paid him on interest, and I wondered if he had in mind any returns from this fruit?

A. My recollection is a check of November 30th for \$209.25 was paid to Mr. Warren.

Mr. BARENDT.—Q. What year?

(Testimony of Ralph G. Spencer.)

A. I am not prepared [177] to swear to that accurately.

Mr. SCHLESINGER.—We have those figures. Nothing had been paid by Bromley on interest to us.

The COURT.—Mr. Warren's statement was: He said "No," when you asked him if anything had been paid on interest. I wondered if that were true, that nothing had been paid.

Mr. SCHLESINGER.—Q. No, that is the fact.

Mr. BARENDT.—Q. If you had not believed at the time you made those advances that the fruit was worth considerably more than the amount of the advances, you would not have made them to Mr. Bromley, would you?

A. No, sir. (Tr., pp. 128-130.)

Testimony of Mary A. Nola, for Defendants.

MARY A. NOLA, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

I reside in San Jose, and I am bookkeeper and stenographer for Elmer Brothers. They are engaged in the nursery business and were so engaged during the months of July to October, 1920. I still hold the same position with them to-day that I held with them then. I know F. G. Bromley. We received an order from Mr. Bromley but it was cancelled. The order was cancelled for those trees in October, 1920; I put it on the card myself. As I recall at the time he said he was going to leave town.

(Testimony of Maud E. Empey.)

The COURT.—There is nothing in the evidence that affects the case.

Mr. SCHLESINGER.—We take exception to that remark. (Tr., pp. 130, 131.)

Testimony of Maud E. Empey, for Defendants.

MAUD E. EMPEY, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

I resided all my life in San Jose, and my occupation is [178] bookkeeper. I am employed by Crothers Realty Company. The head of that concern is Mr. C. Crothers. I was employed by him in that concern in the month of August or September, 1920. I [179] know Mr. Bromley, the plaintiff. I would not be sure whether I saw him at Mr. Crother's office at the time I have indicated. It was August or September; it was in the fall just after the harvesting of fruit. I am not absolutely sure of the time. It was in the fall about harvesting time. I had a conversation with him. Mrs. Bromley was present at that conversation besides myself and Mr. Bromley. Mr. Bromley called in the office and wanted to see Mr. Crothers; Mr. Crothers being absent, he asked me if he could talk to me for a few minutes. We did. He talked to me something about his troubles out there. I don't remember what they were. I remember that he said that he wanted to know if the fruit would not be liable for the pickers' charges, and whether they could not look to all fruit,—to Mr. Warren's interest as well

(Testimony of Joseph T. Brooks.)

as the other, for their compensation; and then he stated that he had spent all of his money, that he was not going to; and no more of his private funds should go into the place. (Tr., pp. 131, 132.)

Testimony of Joseph T. Brooks, for Defendants.

JOSEPH T. BROOKS, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

I resided in San Jose for twenty years.

Q. What is your occupation?

A. Growers' Information Bureau of the California Prune and Apricot Growers Association, Incorporated.

Q. How many men does that concern employ?

Mr. BARENDT.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Sustained.

Mr. SCHLESINGER.—Exception.

(Witness continuing:) I know Mr. Bromley. I have known him since the early part of 1920. In the fall of 1920 I had a [180] conversation with Mr. Bromley in the office of the Association. I do not recollect of anybody being present. There was not anybody specific present; there are a number of field-men who might be around. They were not under conditions where they were likely to have heard it. It was the latter part of October, 1920. Mr. Bromley stated that he expected to give up the property and go north because of his circumstances. Because of the financial situation there was a con-

(Testimony of Joseph T. Brooks.)

versation in which the financial situation came in later on, if I am at liberty to state it. I had another conversation with Mr. Bromley considerably later. I am positive it was in 1921; he came one Saturday. I do not know exactly; it was a good while after he had left San Jose and then came back. (Tr., pp. 132-134.)

Testimony of Frank G. King, for Defendants.

FRANK G. KING, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

I have lived in San Jose for 41 years. I know Mr. Bromley. I know Mr. Edwin A. Wilcox and have known him a number of years. I had a conversation with Mr. Wilcox, and I took Bromley up to his office; he was evidently dissatisfied with the purchase of his ranch. I had a conversation with Mr. Bromley on or about January 7, 1921. Mr. Bromley stated it was his intention to give up his ranch, he did not want it; he was dissatisfied with it, and he would not take it back if it was given to him. (Tr., pp. 134-136.)

Testimony of David J. O'Neil, for Defendants.

DAVID J. O'NEIL, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

I am Special Agent, Labor of Statistics. I was a Deputy Labor Commissioner for San Francisco on the 4th day of December, [181] 1920. I know

(Testimony of David J. O'Neil.)

Mr. Bromley. I had a conversation with Mr. Bromley at 822 Clayton Street on December 4, 1920. Mr. Bromley and myself were present. I made a memorandum of the conversation at the time. I went to Mr. Bromley with a wage complaint of the State Labor Bureau. I had a claim against him by Henry Savio for \$345; the bill was originally \$375, he had paid \$40, leaving a balance of \$345. I asked Mr. Bromley if he knew the plaintiff; he said "yes." I says: "He claims that you owe him \$340." He says: "Yes." He said, he acknowledged owing him this money; at present he was not able to make a payment, but if he ever should be able, be in a position to pay the plaintiff, he would gladly do so. (Tr., pp. 137, 138.)

Testimony of Herbert Pash, for Defendants.

HERBERT PASH, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

My temporary residence is in Los Angeles. I lived in Santa Clara Valley from 1890 until the end of 1920 in November. With respect to the Warren place I lived just across the road. I had 32½ of irrigation acres, partly in apricots, partly in prunes, partly in cherries and walnuts. I have been an orchardist in that particular place since 1893. I lived on the place the whole time. In 1893 I picked apricots there. I know the place as well as I know my own place. Apricots should be pruned immediately after the leaves have dropped,

(Testimony of Herbert Pash.)

when the tree is dormant. The apricots should have been pruned just as soon as the trees are dormant, which would vary according to climatic conditions; some years it takes a short time, some years it takes longer. I have seen trees grow into November; other times they stop growing in September. It is dependent upon those annual differences. The proper time to have pruned the apricot and prune trees on the Warren ranch was not later than December for apricots. The prunes [182] could be pruned later without affecting them. It has been my experience as an orchardist to get your pruning done immediately as you can, because you have other things you cannot do while pruning. The trees should be planted in land in that locality as soon as possible after the first rains; as soon as your soil is conditioned, dig the holes and plant your trees as early as possible. Early in January. I was on that ranch during 1919. With respect to its condition in a general way it averages with the rest of the other orchards in that locality. I was not on that ranch immediately after Bromley departed from that county in 1920. I was on the ranch during Bromley's occupancy. Not after the first of November. I was not there in the month of November, but in October. (Tr., pp. 165-168.)

Q. Did you then inspect the ranch?

A. In October?

Q. Yes. A. In a general way, yes.

The COURT.—Q. What do you mean "by a general way"?

(Testimony of Herbert Pash.)

A. Just from impressions I gathered from walking through it.

The COURT.—I would not permit him to testify regarding it.

Mr. SCHLESINGER.—Q. Did you inspect the ranch at any prior month between the first day of March, 1920, and the first day of November, 1920?

A. Yes. I walked through that orchard a good many times. I have found in my experience as an orchardist, and I have made it a practice, whenever I have spare time, it is a good thing to wander over to my neighbor's ranch to see how they are running things, and compare their methods with my own.

Q. How many visits did you make?

A. In March to October, 1920?

Q. Yes. Between March to October, 1920, how many times, [183] if any, did you visit that ranch? A. About fourteen or fifteen times.

Q. What was the purpose of those visits?

A. To notice how the ranch was.

Q. What did you observe on those visits?

A. I noticed the result of the irrigation, and the method of preserving the moisture in the soil. I noticed the condition of the trees, and the condition of the soil.

Q. What in your opinion, was it as to his management, as to being farmer-like or orchardist-like?

A. To my idea it was very unfarmer-like. He did not do what I would have done; and he did what I should not have done.

(Testimony of Herbert Pash.)

Q. What did you observe, if anything, with respect to walnut trees upon that place?

Mr. BARENDT.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Sustained. Moreover, I think I shall call a halt on this sort of evidence under these pleadings.

Mr. SCHLESINGER.—We take an exception.

Q. I will ask you to please state in detail just what you observed with respect to the trees, and the care of the trees on that place during the year 1920 at the time you have indicated?

The COURT.—Q. State what you saw, and the conditions that you say existed.

A. He asked me to draw conclusions from the methods.

Mr. SCHLESINGER.—Q. What did you see with respect to the trees and general conditions?

A. I noticed that the trees were suffering from want of moisture. The fruit in July apparently had suffered from loss of moisture and had dropped. The reason of the loss of moisture was the way [184] the orchard was cultivated. You understand that the moisture is one of the most important things the orchardist has to look after; from 70 to 90 per cent of the fruit taken off an orchard is water, and therefore it is of great importance to the orchardist as to getting water in the soil. If the rainfall is light he must replace that in some way. Fruit is mostly water, so you must have water in the soil to get your fruit. The consequence

(Testimony of Herbert Pash.)

of not having water in the soil on his prune trees on the flat caused them, in my opinion, to drop in July.

Q. Was that condition patent to anybody who had occasion to go on that ranch?

A. I think so.

Q. Would Mr. Warren have noticed it had he gone there?

A. Why, certainly. The general method used in serving water is to turn it in and cover the crop.

Mr. SCHLESINGER.—We seek to have him testify on this branch as an expert.

A. (Contg.) In fact, to put it in a few words: The orchard was suffering from lack of moisture. He could have put the moisture on if he wanted to. There was water enough in the creek to irrigate the whole place over.

The COURT.—Q. Is that a flowing stream?

A. After rainfall; not in the summer-time.

The COURT.—Q. You have to pump the water then from underground percolation? A. Yes.

Q. From wells sunk in the stream?

A. Not necessarily in the stream.

Q. You said there was water enough in the stream?

A. That year, yes. That year was an unusual year. It was light rainfall. It came down in December or January, ran for a short time, later in the spring it came down again. [185]

Mr. SCHLESINGER.—Q. What time in the spring did it come down again?

(Testimony of Herbert Pash.)

A. The latter part of February or the early part of March. That is a thing that was impressed on my mind, for the creek to come down early and dry up, and then come back. A man knowing that his rainfall was light should have used every endeavor to get all the water that came down the creek, and strain every effort to get that water over the ranch.

Q. Did you have occasion to go to that place during the absence of Mr. Bromley, after he had left there? A. No.

Q. Did you have any talk with Mr. Bromley with respect to his care of that place at any time during the year 1920?

A. Mr. Bromley came to me once in particular I remember, and told me that he was green at the orchard business and asked my advice. He was then cultivating early in the winter. I told him he was making a mistake.

The COURT.—Q. That was the winter of 1920?

A. Yes.

Mr. SCHLESINGER.—Q. Did he say anything with respect to small trees?

Mr. BARENDT.—I object to this form of examination.

Mr. SCHLESINGER.—Q. Do you remember anything more? A. No.

Q. Did you have any talk with respect to small trees?

A. No, I don't remember any conversation about young trees.

(Testimony of Herbert Pash.)

Q. Do you know what the reputation of that place has been prior to 1920 for productiveness?

Mr. BARENDT.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. SCHLESINGER.—Exception. (Tr., pp. 168–172.) [186]

On cross-examination said witness testified as follows:

I am a friend of Mr. Bromley's. I paid him friendly visits from March to October. Mr. Bromley asked my advice, and after I gave it, he argued on it. He did not follow my advice. I pruned my orchard in November, 1920. The trees I then pruned were apricots. When I say "I pruned them" I mean I put my man on them; I did not prune them personally. The returns from my orchard for 1920 compared with the returns for 1919 showed a wonderful loss in 1920 over 1919. In 1919 I got 61 tons.

Mr. SCHLESINGER.—Objected to as not proper cross-examination.

The COURT.—Objection overruled.

Mr. SCHLESINGER.—Exception.

The COURT.—Q. How many ton in 1920?

A. I cannot say. 1920 was still on the trees, and I did not pick them. I never heard just what the tonnage was.

Q. You sold them for so much per ton?

A. No; I estimated the crop on the trees.

(Testimony of Herbert Pash.)

Q. You knew there was a large falling off from 1919?

A. Yes.

Q. How do you sell a crop on the trees; how is the value estimated?

A. The usual method is to walk through the orchard, and approximate the number of trees. You know the market price of the fruit, and you figure it out accordingly.

Q. It is more or less of a gamble on both sides,—by the purchaser that he will make, and by the seller that he is getting all that it is worth?

A. Yes.

Mr. BARENDT.—Q. Is there not a difference of opinion among orchardists in regard to the times of pruning trees?

A. Certainly; a very considerable difference. [187]

Q. You recall, do you not, that the first three months of the year 1920 were very dry months?

A. No, the first two months. I would not call March dry.

Q. You do not plant new trees in dry months, do you?

A. I cannot answer that, yes or no.

Q. Please do.

A. If the month previous has been wet you can plant them in a dry month. (Tr., pp. 172, 173.)

Testimony of Archibald Wilson, for Defendants.

ARCHIBALD WILSON, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

I am a dealer in general merchandise and orchardist, and my place of business is the Cupertino Store, Cupertino, California. I know F. G. Bromley. I have known him about two years now dating back from this time. I saw Mr. Bromley at his ranch on or about the first of October, 1920. I had a conversation with him. There was no one else present besides myself and Mr. Bromley during the conversation. Savio was not present. I called upon Mr. Bromley with reference to an account owing us. He said in the course of the conversation that he was without funds, and that while he had funds in other countries that he did not propose to invest any more of those funds in the Warren Ranch proposition. He also told me that the ranch, to use his own language, was "no good." (Tr. p. 174.)

**Testimony of Charles E. Warren, for Defendants
(Recalled—Redirect Examination).**

CHARLES E. WARREN, being recalled by Mr. SCHLESINGER for further redirect examination, testified as follows:

Q. What preparations are necessary for irrigation?

A. You have to dig your land up with furrows or checks, or irrigate in long furrows, five or six fur-

(Testimony of Charles E. Warren.)

rows in a row; make your ditches, and prepare for it,—to get your water where it is necessary. [188]

Q. About what time,—when are those matters attended to?

A. On this particular property the irrigating is to be done when the creek runs. The creek dries up in the summer time, sometimes it will run until the end of March, and sometimes until the end of June. I always water in February and March, and sometimes in January.

Q. What preparations were necessary in 1920?

A. It was the same conditions.

Q. Were you familiar with the water there during the year 1920? A. Yes.

Q. What were the conditions?

A. The conditions were, the rainfall was a little light to what it had been, but the creek came down in December; then it stopped for about two weeks. Then it came down in January, from then until the end of March it ran on and off. I figure the creek ran that year, I watched it very closely, for about eight weeks.

Q. What about the quantity of water during that time?

A. There was plenty of water. Of course, in a year like that you have to use your common judgment, and work long days and nights, so as to be sure you are going to get the water.

Q. Did you have any conversation during the year 1920 upon that subject with Mr. Bromley?

A. A great, great many of them; about once a

(Testimony of Charles E. Warren.)

week during that season I talked to Bromley about water.

Q. What did you say?

A. I said, "Mr. Bromley, you ought to work longer days, and ought to work nights, to be sure you are going to get plenty of water for the ranch." I said: "If it runs later on so much the better, but be sure you [189] get enough water." He said he would take care of the ranch; that is all I could get out of Bromley on any of my talks to him. (Tr., pp. 175, 176.)

**Testimony of Herbert Pash, for Defendants
(Recalled—Redirect Examination).**

HERBERT PASH, being recalled for further redirect examination by Mr. SCHLESINGER, testified as follows:

I was familiar with water conditions of the Warren place in the year 1920. In the early part of the year 1920 there was little water in the creek, being a dry year the water was not steady all the time. It came down early in the year, in January, and dried up and stopped. The creek was dry for a little while. After a heavy rain later during the end of February, there was quite a little creek water coming down. I cannot remember just how many weeks it ran. There was enough water in the creek to irrigate Mr. Warren's place, provided it ran steady day and night and did not stop. I was on the same creek. The name of the creek is Stephen's Creek. (Tr., pp. 176, 177.)

Testimony of I. Okumura, for Defendants.

I. OKUMURA, a witness called on behalf of the defendants, being duly sworn, testified as follows:

I live in Cupertino. I know Mr. Warren. I worked eleven years for him. I worked on orchard work. I know all about the Warren ranch for eleven years. I worked for Mr. Bromley four months and ten days. I commenced to work for Mr. Bromley December 1st, and I quit April 11th. While I was there Mr. Bromley did not do any plowing on the place. The proper time for plowing was about the first of February. I talked with Mr. Bromley about plowing. He said: No plowing, just discing and harrowing.

Q. What is discing and harrowing?

A. Just double discing.

Q. What did Mr. Bromley use, if he did not do any plowing? [190]

A. I mean discing, and spring cultivator.

(Witness continuing:) I had a talk with him about that. I says: Better plow first, then with a disc, then after with the spring cultivator. The water conditions there from the first of January, February and March there was plenty of water in the creek. He started pumping at 10 o'clock and quit at 5 o'clock in the afternoon.

Mr. SCHLESINGER.—Q. Did you have any talk with him about pumping the water, about starting the motor?

A. Yes, starting the motor; the first time I work for Mr. Bromley I start the motor 7 o'clock

(Testimony of I. Okumura.)

myself. Then Bromley says: "Do not start so early." So I start the motor myself; he did not start the motor before 10 o'clock.

Q. What time should the motor have been started?

A. The motor should have been started about 5 o'clock in the morning; quit about half-past eight; plenty of water in the creek then; bye-and-bye, not so much.

Q. You say there was plenty of water in January, February and March? A. Yes. (Tr., pp. 177-179.)

**Testimony of F. Genn Bromley, in His Own Behalf
(Recalled—Cross-examination).**

F. GENN BROMLEY, being recalled for further cross-examination, testified as follows:

I know Mr. E. A. Wilcox, the attorney. I met him on one occasion.

Q. Did you call on Mr. Wilcox at his office in San Jose, on January 7, 1921, there being present Mr. King, Mr. Wilcox and yourself?

A. Three of us were present; as to the exact date I cannot tell you without looking at the diary, but probably you are correct. [191]

Q. Did you have a conversation with Mr. Wilcox at that time and place, those persons being present, in which you said, in substance, that you would not take back the place as a gift, and that the personal property on the place which you had left there you cared nothing about; and didn't you state as

(Testimony of F. Genn Bromley.)

to the horse that they could do with it as they pleased,—or words to that effect, in substance?

A. I would say “No.” Then I will give my explanation: After considerable conversation with Mr. Wilcox respecting the letter he had written to me, against which I protested, the conversation turned to, Would I take the place back? I said: “No, not after this action.” With reference to my personal belongings, I made the reply: “Those would be subject to after consideration.” With respect to the horse, I forget exactly my words, but I know everything that was left there on the orchard at the date when Warren and his attorney took that action—

The COURT.—(Intg.) What action are you speaking of?

A. (Contg.) —taking possession, those articles were subject to the same conditions.

Mr. SCHLESINGER.—Q. You received this letter, did you not, dated December 9, 1920, and marked Plaintiff’s Exhibit No. 2?

A. Yes, this letter you have just been questioning me about, that I saw Mr. Wilcox personally in respect to. I protested that letter.

Q. You did answer this letter in writing?

A. No.

Q. But you answered it in the conversation you have just related? A. Yes.

Q. You answered by the conversation which occurred on January 7, 1921? A. Yes. [192]

(Testimony of F. Genn Bromley.)

Q. You mean by "protesting the letter," protesting what they had done?

A. I protested the action taken implied by that letter, because that letter was the first legal advice of what Mr. Warren had done. I had no information, except from my foreman Savio.

The COURT.—Q. Your foreman had informed you they were in possession? A. Yes.

Mr. SCHLESINGER.—Q. Then, the next thing you did after receiving that was to commence this action? A. Yes. (Tr., pp. 179, 180.)

Mr. SCHLESINGER.—That is the case for the defendants.

Testimony of F. G. Bromley, for Plaintiff (In Rebuttal).

F. G. BROMLEY, the plaintiff, called in rebuttal on behalf of the plaintiff, testified as follows:

Mr. BARENDT.—Q. When Mr. Warren was on the witness-stand yesterday, I asked him whether it was not a fact that on or about the last day of February, or the first week or so in March, 1920, he did not have a conversation with you on your place with reference to the condition of the sick trees, and whether he had not stated: "We will let them go for this year, and gather the crop," and he said something of that kind was said. Will you now state what was said and done on that occasion?

A. The occasion of that visit, Mr. Warren came right through the orchard discussing general or-

(Testimony of F. G. Bromley.)

chard matters, and when we came to a section that had been interplanted with young trees the previous year, one point I raised was working the land; I was very anxious to get my ground right, which was then as hard as cement, when I went there the first time. I wanted to work that land up so when the irrigation came my water would saturate the soil. [193]

The COURT.—State what was said.

A. The newly planted trees were not in alignment with the old trees standing there, consequently it was very, very difficult to get any machinery to work over that ground. My idea was to draw out the old trees, and cultivate and encourage the young trees.

Mr. BARENDT.—Q. Please state what you said, and what you did on that occasion?

A. This is the conversation.

The COURT.—State it that way, then.

A. This conversation actually took place.

Mr. BARENDT.—Q. What was the condition of the place at that time?

A. Those old trees were dying.

Q. Did you draw Mr. Warren's attention to it?

A. Yes.

Q. Tell us what you did.

A. Mr. Warren said he considered it would be better to take advantage of that year's crop on the old trees and let them stand at least one more year.

Q. Were you then prepared to put in new trees?

A. I was prepared, if new trees were obtainable.

(Testimony of F. G. Bromley.)

Q. Did you try to obtain new trees at that time?

A. Yes.

Q. Where?

A. At the principal nursery houses in San Jose.

(Tr., pp. 180, 181.)

Q. At that time did Mr. Warren examine any of those trees with you? A. Yes.

Q. What did he do?

A. He examined the trees and specified generally his views and ideas.

The COURT.—Q. What did he say?

A. He said: "Leave those trees for this year, and take advantage of the fruit on them; they will bear.

Q. (Mr. BARENDT.) Q. You heard Mr. Warren say you asked him what gophers were: Did you ask Mr. Warren such a question? [194]

A. No.

Q. Did you know what gophers were?

A. I ranched for eighteen months prior to that.

Q. Had you ever caught gophers before?

A. Quantities of them.

Q. Where?

A. In my place in San Jose; also on the little ranch I had previous to owning this property.

Q. How many gopher traps were there on that ranch when you went there?

A. About one dozen.

Q. How many did you put on?

A. At least six dozen.

The COURT.—I do not care anything about this evidence at all; I would not spend time on it.

(Testimony of F. G. Bromley.)

The WITNESS.—And kept them working all the time.

Mr. BARENDT.—Q. Outside of trapping did you do anything? A. Killed and shot squirrels.

The COURT.—He testified he poisoned them, and that he hired boys to come there for two or three weeks to shoot them.

The WITNESS.—They were two nephews of Savio's; they were paid for it.

Mr. BARENDT.—Q. You heard the statement made that Savio was a wholly inexperienced man, —or words to that effect, on cross-examination of Mr. Warren, that Savio knew nothing about orcharding. Is that a fact? A. No.

Q. Was he or was he not an orchardist?

A. His career is that of an orchardist for years before the war. He served during the war as a noncommissioned officer; when he was released from the army he took up his pursuit again, and is now running his own orchard. [195]

Q. When Mr. Pash was on the stand he was asked how often he had been on your place,—you remember he counted on his fingers, and then answered “fourteen.” Do you know how often Mr. Pash was on your place?

A. As far as my knowledge goes, it was about twice. It was very, very hard to get Mr. Pash to visit the place; he always complained he was busy.

Q. Did you ever invite him to come over to the place? A. Many times.

(Testimony of F. G. Bromley.)

Q. Mr. Pash further testified that he took water from Stephens Creek?

A. Mr. Pash has two irrigating means; one in the creek, and he bored a well. As far as I know that creek pump was never used, while I lived in that district he used his well pump only.

Q. You also heard him state when he was asked what crop did he get off in 1920 that he could not answer, but it was very much less than the 61 tons he took off in 1919, because he sold the crop on the tree. Do you know, as a matter of fact, whether that crop was gathered by Mr. Pash, or not, and if so, state how you know?

A. The pickers whom I engaged to gather my own fruits also made a contract with Mr. Pash to gather his, and they were paid so much for it. In dipping my own men used to help Mr. Pash at his dipper, and the men who worked that dipper were paid so much per ton for their work.

The COURT.—Q. Are you sure that it was in 1920? A. The same time I was on the ranch.

Mr. BARENDT.—I offer a record of the irrigating done by Mr. Bromley as shown by his diary, showing the digging of ditches, of water and irrigating ditches, commencing as early as [196] January 23, 1920, and continuing until June 28, 1920.

Q. Your diary will show that? A. Surely.

Q. And it is true? A. Absolutely.

Mr. SCHLESINGER.—We object to any notes in detail.

(Testimony of F. G. Bromley.)

The COURT.—They have a right to have the testimony of the witness. Do not testify as to what is in the diary.

Mr. BARENDT.—Q. Without referring to that diary, could you give us the dates and the amount of pumping you did on that ranch? A. No.

Q. That diary is all in your own writing?

A. Correct.

Q. When were the entries made?

A. Day by day.

The COURT.—The purpose of a personal memorandum of any occurrence which is made at or about the time of the occurrence is permitted to be used for what purpose? Not as evidence, but the witness is permitted to refer to it for the purpose of refreshing his memory as to the fact he is then testifying about as to what the fact was, with his mind refreshed by the note which he made at the time.

Mr. BARENDT.—Q. I will ask you to look under date of January 23, 1920, and after you have read it yourself, I will ask you whether the statement made there is true, and then I will ask you what the statement is.

Mr. SCHLESINGER.—Objected to as incompetent, irrelevant and immaterial; it is strictly incompetent testimony.

The COURT.—You are not pursuing the proper course. You ask him a question: "When did you commence irrigating, in what year, or in what

(Testimony of F. G. Bromley.)

month?" If he cannot remember, he can look at his diary, and answer you from his memory.

Mr. BARENDT.—Q. When did you commence irrigating in [197] the year 1920, if you can remember without consulting your diary?

The COURT.—You are not supposed to know that he has got a diary. If the witness says: "I will have to refer to my diary," then he is at liberty to do so.

Mr. BARENDT.—Q. When did you commence irrigating in 1920?

A. I commenced ditching for irrigation on January 23d.

Mr. SCHLESINGER.—I object on the ground that this witness is reading from his diary.

The COURT.—He has a right to; he is refreshing his memory; he is not reading from the diary.

The WITNESS.—I will give you the date in a minute.

Mr. BARENDT.—Q. Give us the date?

A. I commenced ditching on the 23d with the new ditcher that had to be bought; it was double the size that Mr. Warren had used.

Mr. SCHLESINGER.—I understand that is the date he commenced?

Mr. BARENDT.—Yes.

The WITNESS.—(Contg.) We were watching water in the creek very carefully, day by day, anticipating sufficient water. I tried my pump several times, and could pump air. The first day of irrigation to any extent was the 16th of March.

(Testimony of F. G. Bromley.)

Mr. SCHLESINGER.—Q. There was nothing between the 23d of January and the 16th of March?

A. There was not sufficient water available; then there was a lull in the water; the water went down; there was only sufficient water to pump a short time; owing to the lack of rain we had to stop; then there was plenty of rain on March 21st. The tractor was working. I was irrigating again on the 23d of March.

Mr. BARENDT.—Q. Give the hours.

A. 8:30 to 6; 8:30 A. M. until 6. [198]

The COURT.—Q. Did you ever commence irrigating as late as 10 o'clock?

A. I have no knowledge of doing so, unless it was for some specific reason. Then on the following day, irrigating from eight to one.

Mr. SCHLESINGER.—That is the 24th of March?

Mr. BARENDT.—Yes.

The WITNESS.—(Contg.) On that same day, Mr. Warren must have had the afternoon work because my pump was working from 8 A. M. until 5:30; I have got my meter readings. The following day the pump was in trouble, and we were irrigating from 11 to 5. The valves used to get out of order very frequently. It was not a new, modern pump. On the 26th of March, pump trouble, in the early morning. It was always a great difficulty to start that pump to work. Okumura used to be out there, sometimes six or seven o'clock in the morn-

(Testimony of F. G. Bromley.)

ing; it would take him an hour or an hour and a half to start the pump on account of faulty valves. On one or two occasions I would go to Mr. Warren who was familiar with working of the pump and ask him if he could help me; he would come over; on some occasions he was lucky, and on others he was not. On the 27th of March we were irrigating all day. The following day was Sunday; we were not irrigating.

The COURT.—Just run through your diary and see generally how much irrigating you did, and how long that was kept up that season.

The WITNESS.—(Contg.) On the 29th, all day. On the 30th, all day. On the 31st part of the day; the pump failed.

Mr. SCHLESINGER.—Do I understand, your Honor, that the witness is permitted to run over his diary?

The COURT.—Yes; so he will be able to testify by refreshing [199] his memory how much irrigation he did, and what time of the season.

The WITNESS.—(Contg.) On the 17th of April, irrigating all day. The 18th was Sunday. 19, 20, and 21st.

Mr. SCHLESINGER.—Q. Does your diary show the time you commenced on those days?

A. Yes; nine to six; that is when the water was actually running on the ground. Prior to that Okumura was trying to get the pump to start; he would begin at six to start the pump, and complete it at seven.

(Testimony of F. G. Bromley.)

The COURT.—Q. How long did you keep your irrigation up that year?

A. Up to the 21st of April.

Mr. BARENDT.—Q. Look at your diary under dates of June 2d, June 10th, and June 28th?

A. On June 2d, all day. This could not have been from the creek; this must have been domestic water; the water for grapes which I pumped from Mr. Pash's side of the road. There is another mention—

Mr. BARENDT.—Q. (Intg.) How about the 28th? A. The same place.

Q. Did you have any conversation with Mr. Posthlewaiite about the lateness of the water?

Mr. SCHLESINGER.—Objected to as incompetent, irrelevant and immaterial, and self-serving.

A. Repeatedly, day by day.

Mr. BARENDT.—Q. You heard Mr. Warren state yesterday that he had no motor to operate the pump on his land: Did you ever see a motor there?

A. Yes.

Q. Did you ever see it operating there?

A. Yes.

Q. You heard Mr. Warren state he had one-half a day and one-half a night in 1920 of the use of the water from Stephens Creek: [200] What is your recollection or knowledge about that?

A. To my knowledge I pumped for him a few afternoons—

The COURT.—You were not asked that. How much did he use your pump?

(Testimony of F. G. Bromley.)

Mr. BARENDT.—Q. Did he *to knowledge* use it more than one night? A. Yes.

Q. How many times; have you any idea?

A. I am positive of two nights, and a day and a half.

The COURT.—That is enough.

Mr. BARENDT.—Q. Something was said with reference to the condition of that cow: Can you explain the condition of that cow? Are you familiar with cattle? A. Somewhat.

The COURT.—We will draw the line on that.

Mr. BARENDT.—Q. Do you remember the first time you ever entered that house which you occupied during the year 1920? A. Yes.

Q. Was the door opened or locked?

A. Mr. Cruthers showed me all over the house. The door was not locked.

Q. It was not? A. No.

Q. Did anybody admit you? A. No.

Q. You walked in? A. Yes.

Q. Did you, as a matter of fact, frequently leave your door open there? A. Yes, always.

Mr. BARENDT.—Mr. Bromley feels that his financial standing has been impugned by the fact that he stated he was a man of wealth—and there have been certain references about it. I am prepared to show that when he made those statements he had large means.

Q. Mr. Bromley, did you in the year 1920 have interests [201] anywhere outside of Santa Clara Valley, through which you suffered financial losses?

(Testimony of F. G. Bromley.)

A. Yes.

Q. Are you at the present time receiving, or have you since then received any returns from any of those investments? A. No.

Q. Where were those investments?

A. In Russia, in China; in the South Pacific; in England.

Q. Have you at this moment any money on deposit in any bank anywhere? A. Yes.

Q. Where? A. In Russia.

Q. How much?

A. Several thousand pounds sterling; what it would be now we can't tell.

Q. What is the bank?

A. The Russia and English Bank.

Q. Are you connected with any trading company in the Orient? A. With several.

Q. Did you have any shipping? A. Yes.

Q. What have you got? A. A vessel.

Q. Do you own any vessel?

A. I own one, and am part owner in four others.

Q. Has it paid you any returns at all since 1920?

A. No.

Q. If you did make such representations, were they true, or not?

A. They were absolutely true. (Tr., pp. 181-190.)

On cross-examination the witness testified as follows:

Mr. SCHLESINGER.—Q. You say you are the owner of several vessels?

(Testimony of F. G. Bromley.)

A. I am owner of one; and part owner of the four others. [202]

Q. What are the names of those vessels, and where are they?

A. They are in the Pacific, trading down the China Coast and in the Straits Settlement. The boat I referred to as owning is the "Kango."

Q. Where does she ply?

A. Between Hongkong and Torres Island.

Q. Is she there now?

A. She was the last time I heard from her.

Q. When did you last hear from her?

A. The early part of last year.

Q. Who is captain of her?

A. I cannot tell you that. She is under control of my agents in Hongkong.

Q. What is the name of your agent?

A. Hang Mow & Company.

Q. When did you last have any correspondence with that concern?

A. The correspondence goes to London, my headquarters are in London.

Q. Have you any letters from them now?

A. It is quite possible I have, but not recent letters.

Q. What are the names of the other vessels?

A. The "Asia."

Q. Where is she?

A. I cannot tell you. I saw her in Hongkong Harbor.

Q. What is the tonnage of the "Asia"?

(Testimony of F. G. Bromley.)

A. About 22,000.

Q. Where is she registered?

A. She is registered under the Chinese flag. You will find the "Asia" registered in Lloyds. She was a British cruiser.

Q. What is the name of her master?

A. I cannot [203] tell you the name of the master.

Q. When did you last hear from that vessel?

A. In the spring of last year; she came up from the Islands loaded with copra; that is the last thing I heard of her.

Q. These vessels are in your name? A. No.

Q. Are you registered as part owner in any of these vessels? A. Yes.

Q. In all four of them?

A. In all four,—in the company.

Q. Registered where?

A. In the headquarters at Hongkong, in the British Government.

Q. You have no correspondence of recent date concerning them? A. No; it is not necessary.

The COURT.—Q. How does it come that you received no returns from these investments?

A. They are not making money at the present time, like many other commercial organizations in the Orient.

Q. When did you last receive returns?

A. When I was in Hongkong, just before coming to California.

Q. Did you come from Hongkong here?

(Testimony of F. G. Bromley.)

A. Yes.

Mr. SCHLESINGER.—Q. What is the aggregate tonnage of those vessels, do you know?

A. I cannot tell you.

Q. How long have you been connected with them as part owner?

A. Between eighteen and nineteen years.

Q. When did you last receive any letter from your agent or anyone else concerning them?

A. In the early part of last year, communications from Hongkong, and in December of the previous year from London.

Q. Have you them?

A. They are amongst my papers somewhere.
[204]

Q. You don't know where?

A. No,—in my case at home.

Q. You just told counsel that you had on deposit in some bank several thousand pounds sterling?

A. Yes.

Q. In what bank is that on deposit?

A. The Russia and English Bank, in Petrograd; that was sterling exchange from London to Russia before the war.

Q. In your name? A. In my name, yes.

Q. Have you the bank-book?

A. Yes, I believe I have the bank-book; if I have not, it is in London.

The COURT.—Q. When did you have any communication concerning your account?

A. When I was last in Russia. You will see on

(Testimony of F. G. Bromley.)

the passport which I have with me it was about four months before the declaration of the war.

Q. Have you that communication?

A. It was in person.

Mr. SCHLESINGER.—Q. Have you had any communication from the bank or anybody in Russia concerning those several thousand pounds sterling?

A. Not since I was in Petrograd last, the first year of the war.

Q. Did you have any communication, or documentary evidence of any kind? A. No.

Q. Does this passport show anything about a deposit in any bank? A. No.

Q. You were engaged in the opium trade, were you not? A. I have been. (Tr., pp. 190–193.)

**Testimony of Harry Postlethwaite, for Plaintiff
(Recalled—In Rebuttal).**

HARRY POSTLETHWAITE, recalled for the plaintiff in rebuttal, [205] testified as follows:

Mr. BARENDT.—Q. You heard the statement made by Mr. Warren that in January and February, some time in 1921, he had to plant some 500 trees. You testified here you were on that ranch on January 7, 1920, and on many occasions up to the time of the gathering of the last grapes, did you not? A. Yes.

Q. From your knowledge of that ranch, at that time, do you consider that if the 500 trees should have been planted in 1921, that you—in other words, from what you saw on that ranch was it just as

(Testimony of Harry Postlethwaite.)

imperative that those trees should have been planted in 1920?

A. I consider eighty per cent of the whole place should have been replanted.

Q. When you *say* it? A. Yes.

Q. When is it customary to order—

Mr. SCHLESINGER.—The card shows when he ordered.

Mr. BARENDT.—Q. You spoke yesterday of Judge Lieb's ranch? A. No, his son's.

Q. You referred to Judge Lieb's son's place?

A. On his son's place,—it is all Judge Lieb's.

Q. You spoke about being at Judge Lieb's son's place? A. Yes.

Q. In your experience as an orchardist, do you consider it wise to plant young trees in between old ones? A. No.

Q. Why?

A. Because I don't believe you can make a success of it.

Q. Have you had experience? A. Yes.

The COURT.—Q. Do the old trees shadow them?

A. The roots are right in the middle, and young trees put there, the old trees have the stronger roots and they sap the nourishment. (Tr., pp. 193, 194.)
[206]

On cross-examination said witness testified as follows:

Mr. SCHLESINGER.—Q. Don't you know it is quite customary in that Valley to plant in young trees, intersset amongst old ones, and ultimately root

out the old trees, when the young ones have attained sufficient maturity? A. I know it is done.

The COURT.—He is testifying as to the impropriety of the method, in his judgment.

Mr. BARENDT.—That is the plaintiff's case.

Mr. SCHLESINGER.—That is the case for the defendants.

(Testimony closed.)

The COURT.—The matter will be submitted on briefs, ten, ten and ten. (Tr., p. 194.) [207]

Thereafter briefs were submitted to the Court by the respective parties and after due consideration thereof the Court made and entered judgment in favor of the plaintiff, as follows, to wit:

“The COURT (Orally).—In the case of Bromley vs. Warren heretofore tried and submitted, the parties entered into a contract for the sale and purchase of orchard property in Santa Clara Valley. The terms and interpretation of the provisions of the contract were fully discussed and the views of the Court given at the argument and I need not repeat them. The action is brought by the plaintiff, the purchaser, to recover a payment made by him under the contract and the value of certain property upon the place, growing out of the fact that the defendant entered upon the place within the first year, or almost immediately after the termination of the first year, and seized the property with the plaintiff's personalty that was found thereon, on the theory that the plaintiff had breached the contract and the action proceeds upon

the theory that the entry of the defendant was a breach of the contract on his part. I am not going to review the evidence but after its careful consideration it is sufficient for me to say that in my view plaintiff had not failed to perform the contract in any respect but substantially conformed to all its requirements; and that he was entirely within his rights in treating the conduct of the defendant as a breach of the contract by the latter and suing to recover the moneys that had been paid by him upon the contract with the value of the personal property taken by the defendant and also the expenditures by him made in undertaking to carry out the contract. The payment made by the plaintiff was \$6,000 and that he is entitled to recover. I find that the value of the personal property belonging to the plaintiff [208] that was upon the premises when taken over by the defendant to be \$1,800 and I find the amount of money expended by the plaintiff over and above what he received in the way of returns from crops, etc., to be \$1,200 and judgment will be entered in favor of the plaintiff in the total of these sums."

Thereafter and on the 14th day of September, 1922, defendants served and filed herein their petition for a new trial which petition was and is in the words and figures as follows, to wit:

“In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,576.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D. WARREN,

Defendants.

Petition for a New Trial.

Your petitioners, Charles E. Warren and Mabel D. Warren, the defendants in the above-entitled cause, file this their petition for a new trial herein and move the Court to grant a new trial in the above-entitled cause and to vacate and set aside the final judgment heretofore made and entered herein in favor of the said plaintiff and against the said defendants and to grant said defendants a new trial of this action upon the following grounds, to wit:

(1) Insufficiency of the evidence to justify the decision and judgment herein.

(2) That said decision and judgment is against law. [209]

(3) Errors in law occurring at the trial and excepted to by the defendants.

That the papers on which this petition for a new trial is to be made are the pleadings and

papers on file in the above-entitled action and upon the minutes of the court, and the Reporter's Transcript of his shorthand notes taken on the trial of said action.

The following is a specification of the particulars wherein the evidence is claimed to be insufficient to justify the decision and judgment rendered herein, viz.:

I.

That the evidence indisputably shows that the plaintiff had failed to perform the terms of his contract at the time of the defendants' re-entry, and had not performed at any time, or offered to perform.

(a) That he had failed to farm the orchard in a first-class orchardist-like manner as required by the contract to purchase the orchard in this:

He failed to irrigate the orchard at the proper season of the year, thereby causing a large number of fruit trees to die and to receive insufficient moisture. That he failed to remove dead trees from the orchard and to replant new trees as the contract required him to do.

(b) That he failed to irrigate large portions of the orchard as the contract required.

(c) That he failed to prune the trees in the orchard at the proper season, or at all, causing an almost total failure of crops.

(d) That he failed to exterminate rodents and other pests as far as reasonably possible and in consequence thereof [210] seventy-three of the fruit trees in said orchard died.

(e) That he failed to plow and cultivate the orchard in a first-class manner as required by the contract.

(f) That he failed to pay the taxes against the property as he was required to do under the contract.

(g) That the defendants, in consequence of plaintiff's failure to pay said taxes were compelled to pay the same and the plaintiff never offered to repay the defendants therefor.

(h) That the plaintiff failed to pay the interest on the unpaid purchase price of the orchard as required by the contract; that there was due from the plaintiff to the defendants as interest on December 1, 1920, the sum of Two thousand seven hundred Dollars (\$2,700.00).

(i) That the plaintiff never offered to pay said interest.

(j) The evidence conclusively shows that the plaintiff had abandoned the premises before the re-entry of the defendants.

(k) That the evidence indisputably shows that the employees of the plaintiff on said orchard left their employment because plaintiff failed to pay them.

(l) That plaintiff had openly announced that he had given up the orchard.

(m) That he would invest no money of his own in the orchard.

(n) That at the time of the re-entry of defendants the orchard was vacant and such entry was

absolutely necessary for the preservation of said orchard.

(o) That at no time did plaintiff offer to return to said premises or to perform his contract with the defendants.

(p) That the evidence indisputably shows that plaintiff frequently announced that he was impetunious and unable to [211] run the orchard.

(p) That the evidence shows that plaintiff told the defendants and other persons that he expected to leave the orchard and to engage in some other occupation, and that he would not take the place back.

(r) The evidence indisputably shows that plaintiff failed and refused to perform his contract, and he failed to fulfill the stipulations on his part to be kept and performed, and therefore he was not entitled to recover back the moneys he had paid to the defendants on account of the purchase price of the orchard or for improvements made by him on said orchard, or to recover from the said defendants any money whatever.

(s) That the evidence indisputably shows that the said defendants did not breach their contract with plaintiff, and that said defendants had not caused a great loss and/or damage or any loss or damage to plaintiff in a sum exceeding Twelve Thousand and Twenty-five Dollars (\$12,025.00) or in any sum of money whatever or at all.

(t) That there is no evidence to show that the plaintiff had laid out or expended the sum of Three Thousand Five Hundred and Twenty-five Dollars

(\$3,525.00) or any other sum of money in the cultivation of said orchard and including the alleged value of his own labor thereon.

(u) The evidence indisputably shows that said orchard was not enhanced in value in any sum of money whatever resulting from any labor or care bestowed thereon by the plaintiff or any one working for plaintiff.

(v) That the evidence indisputably shows that plaintiff expended no money whatever in the cultivation of the orchard.

(w) The evidence absolutely fails to show that on or [212] about December 1st, 1920, or at any time whatever, or at all, the defendants wrongfully or unlawfully took and have since held possession of or converted to their own use or have deprived plaintiff of the right of possession of any personal property whatever or of anything of value.

The following is a specification of the particular errors of law relied upon:

First. The Court erred in deciding that the defendants had no right to retain the money paid by plaintiff on account of the purchase price of said orchard, cost of improvement or other moneys paid by plaintiff to the defendants as compensation for the rental and occupation of the said orchard as provided by Section 16 of the contract entered into between the plaintiff and the defendants, which reads as follows:

“That in the event said party of the second part fails to perform *any* of the terms and conditions of this agreement, or shall make default

in any payment of principal or interest, then all of the rights of the party of the second part hereto shall terminate *and all payments theretofore made shall be retained by the said parties of the first part and treated as compensation for the rental and occupancy of the said land up to the time of such default*";

as the evidence conclusively shows that plaintiff had failed to perform any of the material conditions of the contract on his part to be kept and performed, namely: that he failed to plow, cultivate, and care for the orchard in a first-class farmer-like way; that he failed to irrigate the orchard at the proper season of the year thus causing a large number of fruit trees therein to die and to receive insufficient moisture; he failed to remove dead trees from the orchard and to replace them with new trees; that he failed to irrigate large portions of the orchard; that he failed to prune the fruit trees in the orchard in the proper [213] season for pruning or at all, thereby causing an almost total failure of fruit crop; that he failed to exterminate rodents and other pests as far as reasonably possible in consequence of which seventy-three fruit trees in said orchard died; he failed to pay the taxes against the property and the defendants were obligated to do so in order to prevent said property from being sold for taxes; that he failed to repay or offer to repay to the defendants the taxes paid by them as aforesaid; that he failed to pay the interest on the unpaid purchase price of the land; that there was due from plaintiff to the defendants

for interest on December 1, 1920, the sum of two thousand seven hundred dollars (\$2,700.00); that he has never offered to pay said interest; that he abandoned the premises before the re-entry of the defendants; that the employees of plaintiff on said orchard left their employment because plaintiff failed to pay them; that plaintiff openly announced that he had given up the orchard; that he would advance no money of his own therein; that at no time had plaintiff offered to return to said premises and/or perform his contract. That plaintiff frequently announced that he was impecunious and unable to run and operate the orchard; that he told the defendants and other persons that he expected to leave the premises and engage in some other occupation and that he would not take the orchard back.

Second. That the Court erred in deciding that the following written notice, namely:

“Mr. and Mrs. Chas. E. Warren have requested me to notify you that owing to your failure to perform any of the terms and conditions of your part to be performed in their agreement to sell and your agreement to buy their 51.61 acres of land, part of Lots 5 & 6, and part of the northeast quarter of the southeast quarter of Sec. 10 Township 7, South Range 2 West, M. D. B. & M., Santa Clara County, California, and personally thereon, they have elected to terminate the agreement, and have taken possession of the property. All moneys heretofore paid on the purchase price

[214] will be treated as compensation for the rental and occupancy of the land, as provided by Section 16 of the agreement," given by the defendants to plaintiff constituted a rescission of the contract for the reason that when said notice was given plaintiff was in default in the particulars hereinbefore specified; that he had abandoned the premises and the notice specifically states that all moneys heretofore paid on the purchase price will be treated as compensation for the rental and occupancy of the land as provided by Section 16 of the agreement,

"All moneys heretofore paid on the purchase price will be treated as compensation for the rental and occupancy of the land, as provided by Section 16 of the agreement."

Third. That the Court erred in finding that the defendants put an end to the contract and in not finding that the defendants stood squarely on the contract made with the plaintiff.

Fourth. That the Court erred in not finding that the defendants were entitled to retain all moneys paid to them by plaintiff pursuant to provisions of Section 16 of the contract or agreement made between plaintiff and defendants as aforesaid.

Fifth. The Court erred in finding the defendants entered and took possession of the premises without right.

Sixth. The Court erred in finding that there was a failure of consideration on the part of the defendants and that therefore plaintiff was entitled to a judgment against them.

Seventh. That the Court erred in making and entering judgment herein in favor of the plaintiff and against the defendants.

WHEREFORE said defendants pray that this their petition to vacate and set aside the decision and judgment made and entered [215] herein and to grant defendants a new trial of this action be granted.

Dated September 14th, 1922.

CHARLES E. WARREN,
MABEL D. WARREN,
Defendants and Petitioners.

EDWIN A. WILCOX,
FRY & JENKINS,
BERT SCHLESINGER,

Attorneys for Defendants and Petitioners."

The foregoing bill of exceptions contains all the evidence that was adduced and all the proceedings had on the trial of said cause and on the motion for a new trial of said cause.

**Presentation of Bill of Exceptions, Notice Thereof,
and Stipulation for Settlement and Allowance
Thereof.**

The defendants herewith present the foregoing as defendants' bill of exceptions herein, and respectfully ask that the same may be allowed.

BERT SCHLESINGER,
EDWIN A. WILCOX,
FRY & JENKINS,
Attorneys for Defendants.

To Arthur H. Barendt, Esq., Attorney for Plaintiff.

Sir: You will please take notice that the foregoing constitutes and is the proposed bill of exceptions of the defendants Charles E. Warren and Mabel D. Warren in the above-entitled cause, and that said defendants will ask the allowance of the [216] same.

BERT SCHLESINGER,
EDWIN A. WILCOX,
FRY & JENKINS,
Attorneys for Defendants.

It is hereby stipulated that the foregoing bill of exceptions is correct, and that the same be settled and allowed by the Court.

ARTHUR H. BARENDT,
Attorney for Plaintiff.
BERT SCHLESINGER,
EDWIN A. WILEY,
FRY & JENKINS,
Attorneys for Defendants.

**Order Making Bill of Exceptions Part of the
Records.**

This bill of exceptions having been duly presented to the Court, and having been amended to correspond to the facts, is now signed and made a part of the records in this cause.

Dated this 18th day of November, 1922.

WM. C. VAN FLEET,
Judge.

Due service and receipt of a copy of the within is hereby admitted this 23d day of October, 1922.

ARTHUR H. BARENDT,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 20, 1922. Walter B. Maling, Clerk. [217]

In the Southern Division of the District Court of
the United States in and for the Northern
District of California, Second Division.

No. 16,576.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D. WAR-
REN,

Defendants.

Petition for Writ of Error.

Now comes Charles E. Warren and Mabel E. Warren and bring this their petition for writ of error to the Southern Division of the District Court of the United States, for the Northern District of California, and in that behalf petitioners show:

On the 11th day of September, 1922, there was made, rendered and entered in the above-entitled court and cause a judgment in favor of said plaintiff and against said defendants Charles E. Warren and Mabel D. Warren, for the sum of Nine Thousand Dollars (\$9,000.00), and costs amounting to the sum of Fifty-five and 40/100 Dollars (\$55.40).

And your petitioners show that they are advised by counsel and they aver that there was and is manifest error in the records and proceedings had in said cause, and in the making, rendition and entry of said judgment, to the great injury and damage of your petitioners, all of which errors will be more fully made to appear by an examination of the said record and by [218] an examination of the bill of exceptions to be tendered and filed and in the assignments of errors presented herewith; and to that end thereafter that the said judgment and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioners now pray that a writ of error may be issued, directed therefrom to said Southern Division of the District Court of the United States for the Northern District of California, returnable according to law and the practice of the court, and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignment of errors, and all proceedings had in said cause, that the same may be removed unto the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the errors, if any have happened, may be duly corrected, and full and speedy justice done to your petitioners.

Dated November 20th, 1922.

E. A. WILCOX,
FRY & JENKINS,
BERT SCHLESINGER,
Attorneys for Petitioners.

Receipt of a copy of the within is hereby admitted
this 21st day of November, 1922.

ARTHUR H. BARENDT,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 21, 1922. Walter B.
Maling, Clerk. [219]

In the Southern Division of the District Court of
the United States in and for the Northern
District of California, Second Division.

No. 16,576.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D. WAR-
REN,

Defendants.

Assignment of Errors.

Charles E. Warren and Mabel D. Warren, the
defendants in the above-entitled action, having
petitioned for an order from said Court permitting
them to procure a writ of error to this court di-
rected from the United States Circuit Court of
Appeals for the Ninth Circuit, from the judgment
made and entered in said cause in favor of said
plaintiff and against Charles E. Warren and Mabel
D. Warren, the above-named defendants, now make
and file with said petition the following assignment
of errors herein upon which they will rely for a

reversal of said judgment upon the said writ, and which errors and each and every of them are to the great detriment, injury and prejudice of the said defendants; and they say that in the record and proceedings in the above-entitled action, upon the hearing and determination thereof in the Southern Division of the District Court of the United States for the Northern District of California, there is manifest error in this, to wit:

1. That the evidence indisputably shows that the plaintiff had failed to perform the terms of his contract at the time of [220] the defendants' re-entry, and had not performed at any time, or offered to perform.

(a) That he had failed to farm the orchard in a first-class orchardist-like manner as required by the contract to purchase the orchard in this:

He failed to irrigate the orchard at the proper season of the year, thereby causing a large number of fruit trees to die and to receive insufficient moisture. That he failed to remove dead trees from the orchard and to replant new trees as the contract required him to do.

(b) That he failed to irrigate large portions of the orchard as the contract required.

(c) That he failed to prune the trees in the orchard at the proper season, or at all, causing an almost total failure of crops.

(d) That he failed to exterminate rodents and other pests as far as reasonably possible and in consequence thereof seventy-three of the fruit trees in said orchard died.

(e) That he failed to plow and cultivate the orchard in a first-class manner as required by the contract.

(f) That he failed to pay the taxes against the property as he was required to do under the contract.

(g) That the defendants, in consequence of plaintiff's failure to pay said taxes, were compelled to pay the same and the plaintiff never offered to repay the defendants therefor.

(h) That the plaintiff failed to pay the interest on the unpaid purchase price of the orchard as required by the contract; that there was due from the plaintiff to the defendants as interest on December 1, 1920, the sum of Two Thousand Seven Hundred Dollars (\$2,700.00). [221]

(i) That the plaintiff never offered to pay said interest.

(j) The evidence conclusively shows that the plaintiff had abandoned the premises before the re-entry of the defendants.

(k) That the evidence indisputably shows that the employees of the plaintiff on said orchard left their employment because plaintiff failed to pay them.

(l) That plaintiff had openly announced that he had given up the orchard.

(m) That he would invest no money of his own in the orchard.

(n) That at the time of the re-entry of defendants the orchard was vacant and such entry was

absolutely necessary for the preservation of said orchard.

(o) That at no time did plaintiff offer to return to said premises or to perform his contract with the defendants.

(p) That the evidence indisputably shows that plaintiff frequently announced that he was impecunious and unable to run the orchard.

(q) That evidence shows that plaintiff told the defendants and other persons that he expected to leave the orchard and to engage in some other occupation, and that he would not take the place back.

(r) The evidence indisputably shows that plaintiff failed and refused to perform his contract, and he failed to fulfill the stipulations on his part to be kept and performed, and therefore he was not entitled to recover back the moneys he had paid to the defendants on account of the purchase price of the orchard or for improvements made by him on said orchard, or to [222] recover from the said defendants any money whatever.

(s) That the evidence indisputably shows that the said defendants did not breach their contract with plaintiff, and that said defendants had not caused a great loss and/or damage or any loss or damage to plaintiff in a sum exceeding Twelve Thousand and Twenty-five Dollars (\$12,025.00) or in any sum of money whatever or at all.

(t) That there is no evidence to show that the plaintiff had laid out or expended the sum of Three

Thousand Five Hundred and Twenty-five Dollars (\$3,525.00) or any other sum of money in the cultivation of said orchard and including the alleged value of his own labor thereon.

(u) The evidence indisputably shows that said orchard was not enhanced in value in any sum of money whatever resulting from any labor or care bestowed thereon by plaintiff or anyone working for plaintiff.

(v) That the evidence indisputably shows that plaintiff expended no money whatever in the cultivation of the orchard.

(w) The evidence absolutely fails to show that on or about December 1st, 1920, or at any time whatever, or at all, the defendants wrongfully or unlawfully took and have since held possession of or converted to their own use or have deprived plaintiff of the right of possession of any personal property whatever or of anything of value.

2. That the Court erred in not holding that the decision of the Superior Court of the State of California for the County of Santa Clara sustaining the demurrer to the complaint for the same cause of action and between the same parties constituted a bar to the action herein.

3. The Court erred in deciding that the defendants [223] had no right to retain the money paid by plaintiff on account of the purchase price of said orchard, cost of improvement or other moneys paid by plaintiff to the defendants as compensation for the rental and occupation of the said orchard as provided by Section 16 of the contract entered into

between the plaintiff and the defendants, which reads as follows:

“That in the event said party of the second part fails to perform *any* of the terms and conditions of this agreement, or shall make default in any payment of principal or interest, then all the rights of the party of the second part hereto shall terminate and *all payments theretofore made shall be retained by the said parties of the first part and treated as compensation for the rental and occupancy of the said land up to the time of such default*”;

as the evidence conclusively shows that plaintiff had failed to perform many of the material conditions of the contract on his part to be kept and performed, namely: that he failed to plow, cultivate, and care for the orchard in a first-class, farmer-like way; that he failed to irrigate the orchard at the proper season of the year thus causing a large number of fruit trees therein to die and to receive insufficient moisture; he failed to remove dead trees from the orchard and to replace them with new trees; that he failed to irrigate large portions of the orchard; that he failed to prune the fruit trees in the orchard in the proper season for pruning or at all, thereby causing an almost total failure of fruit crop; that he failed to exterminate rodents and other pests as far as reasonably possible in consequence of which seventy-three fruit trees in said orchard died; he failed to pay the taxes against the property and the defendants were obligated to do so in order to prevent said property from

being sold for taxes; that he failed to repay or offer to repay to the defendants the taxes paid by them as aforesaid; that he failed to pay the interest on the unpaid purchase price of the land; that there was due from plaintiff to the defendants for interest on December [224] 1, 1920, the sum of two thousand seven hundred dollars (\$2,700.00); that he has never offered to pay said interest; that he abandoned the premises before the re-entry of the defendants; that the employees of plaintiff on said orchard left their employment because plaintiff failed to pay them; that plaintiff openly announced that he had given up the orchard; that he would advance no money of his own therein; that at no time had plaintiff offered to return to said premises and/or perform his contract. That plaintiff frequently announced that he was impecunious and unable to run and operate the orchard; that he told the defendants and other persons that he expected to leave the premises and engage in some other occupation and that he would not take the orchard back.

4. That the Court erred in deciding that the following written notice, namely:

“Mr. and Mrs. Chas. E. Warren have requested me to notify you that owing to your failure to perform many of the terms and conditions on your part to be performed in their agreement to sell and your agreement to buy their 51.61 acres of land, part of Lots 5 & 6, and part of the northeast quarter of the southeast quarter of Sec. 10 Township 7, South

Range 2 West, M. D. B. & M., Santa Clara County, California, and personally thereon, they have elected to terminate the agreement, and have taken possession of the property. All moneys heretofore paid on the purchase price will be treated as compensation for the rental and occupancy of the land, as provided by Section 16 of the agreement,"

given by the defendants to plaintiff constituted a rescission of the contract for the reason that when said notice was given plaintiff was in default in the particulars hereinbefore specified; that he had abandoned the premises and the notice specifically states that all moneys heretofore paid on the purchase price will be treated as compensation for the rental and occupancy of the land as provided by Section 16 of the Agreement,

"All moneys heretofore paid on the purchase price will be treated as compensation for the rental and occupancy of the land, as provided by Section 16 of the agreement." [225]

5. That the Court erred in finding that the defendants put an end to the contract and in not finding that the defendants stood squarely on the contract made with the plaintiff.

6. That the Court erred in not finding that the defendants were entitled to retain all moneys paid to them by plaintiff pursuant to provisions of Section 16 of the contract or agreement made between plaintiff and defendants as aforesaid.

7. The Court erred in finding the defendants

entered and took possession of the premises without right.

8. The Court erred in finding that there was a failure of consideration on the part of the defendants and that therefore plaintiff was entitled to a judgment against them.

9. That the Court erred in making and entering judgment herein in favor of the plaintiff and against the defendants.

Dated November 20, 1922.

E. A. WILCOX,
FRY & JENKINS,
BERT SCHLESINGER,

Attorneys for Defendants and Plaintiffs in Error.

Receipt of a copy of the within is hereby admitted this 21st day of November, 1922.

ARTHUR H. BARENDT,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 21, 1922. Walter B. Maling, Clerk. [226]

In the Southern Division of the District Court of
the United States in and for the Northern
District of California, Second Division.

No. 16,576.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D.
WARREN,

Defendants.

Order Allowing Writ of Error.

The petition of Charles E. Warren and Mabel D. Warren, defendants above named, for a writ of error herein, having been duly considered, is hereby allowed; and, the bond for costs upon the writ of error is hereby fixed at the sum of Five Hundred Dollars (\$500.00).

Dated: November 20th, 1922.

WM. C. VAN FLEET,
District Judge of the United States for the North-
ern District of California.

Receipt of a copy of the within is hereby admitted
this 21st day of November, 1922.

ARTHUR H. BARENDT,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 21, 1922. Walter B.
Maling, Clerk. [227]

In the Southern Division of the District Court of
the United States in and for the District of
California, Second Division.

No. 16,576.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D.
WARREN,

Defendants.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS that we, Charles E. Warren and Mabel D. Warren, defendants above named, as principals, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto F. Genn Bromley, the plaintiff in the above-entitled action, in the full and just sum of Ten Thousand Five Hundred Dollars (\$10,500), to be paid to the said F. Genn Bromley, his heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 15th day of November, 1922.

WHEREAS on the 11th day of September, 1922, the District Court of the United States for the Southern Division of the Northern District of California, Second Division, in a suit pending in said court between the said F. Genn Bromley, as plaintiff, and Charles E. Warren and Mabel D. Warren, as defendants, made and [228] entered a judgment in favor of the said plaintiff and against the said defendants in the sum of Nine Thousand Dollars (\$9,000) and costs expended, taxed at Fifty-five and 40/100 Dollars (\$55.40); and,

WHEREAS, the said defendants are about to apply for a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment, and for a citation directed

to the plaintiff to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, pursuant to the terms and at the time fixed in said citation; and,

WHEREAS, the said defendants are desirous of staying the execution of said judgment, and we do further in consideration thereof and of the premises jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the said sum of Ten Thousand Five Hundred Dollars (\$10,500), that if the said judgment appealed from, or any part thereof be affirmed, or the writ of error be dismissed, the said defendants will pay in United States gold coin the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the said defendants, or either of them, in the prosecution of said writ of error, and the surety hereto hereby agrees that in case of a breach of any condition thereof the above-named court may upon notice to it of not less than ten (10) days, proceed summarily in the action or suit in which the same was given, to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execution therefore; that upon the performance of said conditions,

[229] then the obligation to be void; otherwise to remain in full force, virtue and effect.

CHARLES E. WARREN, (Seal)

MABEL D. WARREN, (Seal)

Principals.

UNITED STATES FIDELITY AND
GUARANTY COMPANY OF BALTI-
MORE, MARYLAND, (Seal)

By PEARL MANKINS,

Its Attorney in Fact.

State of California,

County of Santa Clara,—ss.

On this sixteenth day of November, in the year A. D. one thousand nine hundred and twenty-two, before me, Grace P. Still, a notary public, in and for the county of Santa Clara, residing therein, duly commissioned and sworn, personally appeared Pearl Mankins personally known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of the United States Fidelity and Guaranty Company of Baltimore, Md., a corporation, and the said Pearl Mankins duly acknowledged to me that she subscribed the name of the United States Fidelity and Guaranty Company of Baltimore, Md., thereunto as principal and her own name as Attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official Seal, at my office in said county of Santa Clara, the day and year in this Certificate above written.

[Seal]

GRACE P. STILL,

Notary Public in and for the County of Santa Clara, State of California. [230]

State of California,
County of Santa Clara,—ss.

On this 15th day of November, in the year one thousand nine hundred and twenty-two, before me, Edwin A. Wilcox, a notary public in and for the said County of Santa Clara, residing therein, duly commissioned and sworn, personally appeared Charles E. Warren and Mabel D. Warren, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the City of San Jose, county of Santa Clara, the day and year in this Certificate first above written.

[Seal]

EDWIN A. WILCOX,

Notary Public in and for the County of Santa Clara, State of California.

Form and sufficiency of the within bond is approved this 20th day of Nov. 1922.

W. B. MALING,
Clerk.

[Endorsed]: Filed Nov. 20, 1922. Walter B. Maling, Clerk. [231]

In the Southern Division of the District Court of
the United States in and for the Northern Dis-
trict of California, Second Division.

No. 16,576.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D. WAR-
REN,

Defendants.

Cost Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, Charles E. Warren and Mabel D. Warren,
the defendants above named, as principals, and the
United States Fidelity and Guaranty Company of
Baltimore, Maryland, as surety, are held and firmly
bound unto F. Genn Bromley, the plaintiff in the
above-entitled action, in the full and just sum of
Five Hundred Dollars (\$500.00), to be paid to the
said F. Genn Bromley, this heirs, executors admin-
istrators or assigns; to which payment well and
truly to be made, we bind ourselves, our heirs, ex-
ecutors and administrators, jointly and severally by
these presents.

Sealed with our seals and dated this —— day of
November, 1922.

WHEREAS, lately in the Southern Division of
the District Court of the United States for the
Northern District of California, Second Division,

in a suit pending in said court between the said F. Genn Bromley, as plaintiff, and Charles E. Warren and Mabel D. Warren, as defendants, a judgment was [232] rendered in favor of the said plaintiff and against the said defendants, and the said defendants, Charles E. Warren and Mabel D. Warren, having obtained from said United States District Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said F. Genn Bromley citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California;

Now, the condition of the above obligation is such, that if the said Charles E. Warren and Mabel D. Warren, the defendants in the aforesaid action, shall prosecute their writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

CHARLES E. WARREN, (Seal)

MABEL D. WARREN, (Seal)

Principals.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY OF BALTIMORE,
MARYLAND, (Seal)

By PEARL MANKINS,

Its Attorney in Fact. [233]

State of California,

County of Santa Clara,—ss.

On this 22d day of November, in the year A. D.
one thousand nine hundred and twenty-two, before

me, Grace P. Still, a notary public, in and for the County of Santa Clara, residing therein, duly commissioned and sworn, personally appeared Pearl Mankins personally known to me to be the person *is* whose name she subscribed to the within instrument as the Attorney in Fact of the United States Fidelity and Guaranty Company of Baltimore, Md., a corporation, and the said Pearl Mankins duly acknowledged to me that she subscribed the name of the United States Fidelity and Guaranty Company of Baltimore, Md., thereunto as principal and her own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the said County of Santa Clara, the day and year in this certificate above written.

[Seal] GRACE P. STILL,
Notary Public in and for the County of Santa Clara,
State of California.

State of California,
County of Santa Clara,—ss.

On this 22d day of November, in the year one thousand nine hundred and twenty-two, before me, Edwin A. Wilcox, a notary public in and for the said County of Santa Clara, residing therein, duly commissioned and sworn, personally appeared Chas. E. Warren and Mabel D. Warren, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in

the City of San Jose, County [234] of Santa Clara, the day and year in this certificate first above written.

[Seal] EDWIN A. WILCOX,
Notary Public in and for the County of Santa
Clara, State of California.

Approved this 24th day of November, 1922.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Nov. 24, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [235]

In the Southern Division of the District Court of
the United States in and for the Northern Dis-
trict of California, Second Division.

No. 16,576.

F. GENN BROMLEY,
Plaintiff,
vs.

CHARLES E. WARREN and MABEL D. WARREN,
Defendants.

Praeceptum for Transcript on Writ of Error.

To the Clerk of the Above-named Court:

Sir: Please prepare certified transcript on writ of error of the following pleadings, papers and orders:

1st. Complaint and summons.

- 2d. Notice of motion to strike out parts of the complaint.
- 3d. Demurrer to complaint.
- 4th. Amended notice of motion to strike out.
- 5th. Amended demurrer.
- 6th. Order overruling demurrer and motion to strike out parts of complaint.
- 7th. Notice of overruling of demurrer and denying motion to strike out parts of complaint.
- 8th. Answer to complaint.
- 9th. Amendment to answer.
- 10th. Stipulation waiving trial by jury.
- 11th. Judgment.
- 12th. Petition for new trial. [236]
- 13th. Order denying new trial.
- 14th. Bill of exceptions as settled by trial Judge.
- 15th. Petition for writ of error.
- 16th. Order allowing writ of error.
- 17th. Assignment of errors.
- 18th. Bond for costs.
- 19th. Supersedeas bond.
- 20th. Writ of error.
- 21st. Citation on writ of error.
- 22d. Praecipe for certified transcript.

Dated: December 9, 1922.

EDWIN A. WILCOX,
BERT SCHLESINGER,
FRY & JENKINS,
Attorneys for Defendants.

[Endorsed]: Filed Dec. 9, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [237]

(Title of Court and Cause.)

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing two hundred thirty-seven (237) pages, numbered from 1 to 237, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$103.80; that said amount was paid by the defendants, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set
my hand and affixed the seal of said District Court
this 18th day of December, A. D. 1922.

[Seal] WALTER B. MALING,
Clerk United States District Court in and for the
Northern District of California. [238]

In the Southern Division of the District Court of
the United States in and for the Northern Dis-
trict of California, Second Division.

No. 16,576.

F. GENN BROMLEY,

Plaintiff and Defendant in Error,

vs.

CHARLES E. WARREN and MABEL D. WAR-
REN,

Defendants and Plaintiffs in Error.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to
the Honorable, the Judges of the District Court
of the United States for the Northern District
of California, GREETING:

Because, in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
the said District Court, before you, or some of you,
between Charles E. Warren and Mabel D. Warren,
plaintiffs in error, and F. Genn Bromley, defendant
in error, a manifest error hath happened, to the
great damage of the said plaintiffs in error, as by
their complaint appears:

We, being willing that error, if any hath been,
should be duly corrected, and full and speedy jus-
tice done to the parties aforesaid in this behalf, do
command you, if judgment be therein given, that
then, under your seal, distinctly and openly you

send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals [239] for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WM. HOWARD TAFT, Chief Justice of the United States, the 20th day of November, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

Deputy Clerk.

Allowed by:

WM. C. VAN FLEET,
Judge.

Dated: November 20th, 1922. [240]

Receipt of a copy of the within is hereby admitted
this 21st day of November, 1922.

ARTHUR H. BARENDT,
Attorney for Plaintiff.

[Endorsed]: No. 16,576. Southern Division of the District Court of the United States, Northern District of California, Second Division. F. Genn Bromley, Plaintiff in Error, vs. Charles E. Warren and Mabel D. Warren, Defendants and Plaintiffs in Error. Writ of Error. Filed Nov. 21, 1922. Walter B. Maling, Clerk.

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,
Clerk United States District Court for the Northern
District of California. [241]

In the Southern Division of the District Court of
the United States in and for the Northern Dis-
trict of California, Second Division.

No. 16,576.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D. WAR-
REN,

Defendants.

Citation on Writ of Error.

United States of America,
Northern District of California,—ss.

To F. Genn Bromley, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's office at the United States District Court for the Northern District of California, wherein Charles E. Warren and Mabel D. Warren are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [242]

WITNESS, the Honorable WM. C. VAN
FLEET, Judge of the United States District Court,

for the Northern District of California, this 20th day of November, 1922.

WM. C. VAN FLEET,
United States District Judge. [243]

Receipt of a copy of the within is hereby admitted this 21st day of November, 1922.

ARTHUR H. BARENDT,
Attorney for Plaintiff.

[Endorsed]: No. 16,576. Southern Division of the District Court of the United States, Northern District of California, Second Division. F. Genn Bromley, Plaintiff, vs. Charles E. Warren and Mabel D. Warren, Defendants. Citation on Writ of Error. Filed Nov. 21, 1922. Walter B. Maling, Clerk.

[Endorsed]: No. 3956. United States Circuit Court of Appeals for the Ninth Circuit. Charles E. Warren and Mabel D. Warren, Plaintiffs in Error, vs. F. Genn Bromley, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed December 19, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3956

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

2

CHARLES E. WARREN and MABEL D. WARREN,
Plaintiffs in Error,

VS.

F. GENN BROMLEY,
Defendant in Error.

OPENING BRIEF FOR PLAINTIFFS IN ERROR.

EDWIN A. WILCOX,
FRY & JENKINS,
BERT SCHLESINGER,
Attorneys for Plaintiffs in Error.

FILED

FEB 15 1923

F. D. MONCKTON,
CLERK.

No. 3956

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES E. WARREN and MABEL D. WARREN,
Plaintiffs in Error,

VS.

F. GENN BROMLEY,
Defendant in Error.

OPENING BRIEF FOR PLAINTIFFS IN ERROR.

This action was brought by the defendant in error (hereinafter called the plaintiff) against the plaintiffs in error (hereinafter called defendants), to recover damages for the alleged breach of a contract for the sale and purchase of real and personal property. The case was tried before the District Court of the United States, for the Southern Division of the Northern District of California, without a jury, and judgment was rendered in favor of defendant in error for the total sum of \$9000.

ALLEGATIONS OF COMPLAINT.

The complaint in this action alleges that on December 1, 1919, plaintiff and defendant entered into

an agreement for the purchase and sale of certain real and personal property; that upon execution of the agreement plaintiff paid \$6000 on account of the purchase price, and agreed to pay the balance of \$45,000 on or before five years from that date, with interest at the rate of six per cent per annum, payable annually; that plaintiff entered into immediate possession of the property and continued thereafter during 1920 to farm the land; *that on or about September 30, 1920, plaintiff placed the property in the temporary care of a competent foreman and went to San Francisco*; that during his absence and about December 1, 1920, *defendants wrongfully and unlawfully and without the knowledge or consent of the plaintiff, entered upon said premises, and claimed that plaintiff had broken his contract and that they were entitled to resume possession of the property, and that plaintiff had forfeited all his right to moneys paid thereon; that plaintiff has duly and fully performed all the terms and conditions of said contract on his part to be performed*; that defendants by their breach of the contract have damaged plaintiff in the sum of \$12,025, which damages are: \$6000 paid on the purchase price; \$3625 alleged to have been expended for labor and the value of his own labor; \$2500 alleged to be the enhanced value of the property resulting from the alleged labor and care bestowed on it by him; such other sums as the court may see fit to allow him on

account of the alleged breach by defendants; \$2216.38 for conversion of certain personal property which he claims he left on the ranch.

DENIALS AND ALLEGATIONS OF ANSWER.

The answer of defendants denies that on or about December 1, 1920, during plaintiff's absence, *defendants wrongfully or unlawfully or without the knowledge or consent of plaintiff, entered upon said premises*; but admit that on December 8, 1920, defendants entered and took possession of said real property for the reason that plaintiff had breached his contract, as alleged in the answer, and that all of his rights thereunder had terminated;

Deny that defendants have violated or broken their contract;

Deny that plaintiff has duly or fully or at all performed the conditions of the contract on his part to be performed;

Allege and specify many breaches of the contract upon the part of plaintiff, and allege that because of his breaches all of his rights under the contract terminated and all payments made by him should be treated as compensation for the rental and occupancy of the land up to December 8, 1920;

Deny that any act of defendants have caused *any loss or damage to plaintiff of any sum at all*.

**CONDITIONS OF CONTRACT BETWEEN PLAINTIFF
AND DEFENDANTS.**

In the fall of 1919, plaintiff applied to defendants for the purchase of the property which is the subject of this action. This property consists of fifty-five acres of fruit-bearing orchard, on which is situated a large dwelling house and other buildings, and many farming implements and machinery, and was valued at more than fifty thousand dollars.

On December 1, 1919, an agreement was entered into between the parties for the sale and purchase of the property. Under the terms of this agreement it was provided that the purchase price of the property should be \$51,000. At the time of the execution of the agreement plaintiff paid to defendants only \$6000 on account of the purchase price, and agreed to pay the remaining \$45,000 thereof within five years from that date, with interest thereon at the rate of six per cent per annum, *payable annually*. It was further provided that if the interest was not paid when due, it should be added to the principal and become a part thereof, and thereafter bear interest at the same rate.

Under this agreement plaintiff agreed *to farm the premises in a first-class farmerlike and orchardistlike manner; to prune the trees at the proper time each year, and as far as possible to remove all borers from the roots thereof; to remove all dead trees and as soon as customary thereafter to replant the same with apricot or prune trees; to irrigate the orchard each year when water was available; to eradicate*

all rodents and other pests so far as reasonably possible; *to spray the pear trees* each year as often as it is customary to do so.

It was agreed by the parties that the title to 60% of the crop grown each year on the orchard should remain in the defendants until it was sold and the proceeds disposed of in the manner provided for in the contract, and that sale should be made in the joint names of the parties in the proportion of 60% in the name of defendants, and 40% in the name of plaintiff, and that the portion which should go to defendants should be *credited* by them on *unpaid interest* and the balance on the principal.

It was further agreed that defendants might, at any time, enter upon the premises and inspect them.

That *plaintiff should pay all taxes and assessments* which might be assessed against the property until the payment of the full purchase price, and in the event of his failure to pay any of the assessments *when due*, the defendants

“retain the privilege of paying the same and upon doing so, said amount or amounts so paid shall thereupon become a part of the principal and shall bear a like interest and *be immediately due and payable*” (Tr. p. 17).

It was also agreed that in the event plaintiff

“fails to perform ANY of the terms and conditions of this agreement, or shall make default in any payment of principal or interest, then all of the rights of the party of the second part hereto shall terminate and all payments there-

tofore made shall be retained by the said parties of the first part and treated as compensation for the rental and occupancy of the said land up to the time of such default'' (Tr. p. 17).

And that "time is and shall be the essence of this contract."

PRELIMINARY STATEMENT.

It shall be our purpose in presenting this appeal, to rely solely upon the undisputed evidence of the defaults upon the part of plaintiff of the conditions of the contract in question, and, indeed, principally upon his own testimony with respect of those defaults; of his abandonment of the property which he agreed to purchase; of his statements to various persons in the vicinity in which the property is located that he was going to leave the premises; that the property was "no good," that it was a "white elephant," and that he did not intend to put any more of his money into it; his refusal to reoccupy the property after his abandonment and the occupancy thereof by defendants, which occupancy occurred with his consent, and his failure to show his readiness, willingness or ability to perform his contract; and upon his refusal to pay his many obligations with respect of his possession of the property and *his failure to offer to do so.*

These matters we shall point out in detail.

STATEMENT OF FACTS.

At the time plaintiff sought to purchase this property, he represented himself to be a man of great wealth; and able to assume all of the financial obligations of the contract.

PLAINTIFF'S REPRESENTATIONS OF GREAT WEALTH.

We desire to call the Court's attention to plaintiff's testimony (Tr. pp. 232-236) with respect of his financial position, as bearing upon the question of his good faith and intention to carry out his contract, considered in the light of his conduct with respect of the performance of his obligations.

It will be noted from this testimony, that plaintiff claimed to have on deposit in the Russia and English Bank of Petrograd, several thousand pounds sterling. He stated, however, that he had had no communication whatever concerning this account since about four months before the declaration of war—a period of several years. He also claimed to be the owner of one of the largest vessels in the world, and part owner of four others, with office headquarters in London. He did not, however, know the names of the masters or captains of any of these vessels, nor did he know where any of the vessels were, except that they were somewhere in the Pacific Ocean. He mentioned the tonnage of one vessel, but stated that although he had been connected with the other four for a period of 18 or 19 years, that he did not know the tonnage of them;

and, further, that he had had no recent correspondence concerning any of these vessels, and had not received any financial returns from them.

He further testified that he had been an opium trader.

If plaintiff's testimony regarding his financial position be true, then he was wholly without excuse for his failure to perform his obligations under the contract. If, on the other hand, he did not have the financial ability to carry out the contract, then, too, he was without excuse, for, as we shall hereinafter point out, he stated to a great many people that he did not intend to put any more of his money into the enterprise; clearly showing that he was speculating purely on the rise in the value of crops. Such conduct is condemned in *Hansborough v. Peck*, 72 U. S. 497, 18 L. Ed. 522, hereinafter referred to.

ABANDONMENT OF PROPERTY BY PLAINTIFF.

Immediately upon execution of the agreement of December 1, 1919, plaintiff entered into possession of the premises, and moved his family and household furniture into the dwelling house. He remained in possession until October 9, 1920—a period of ten months—*when he abandoned the property* and moved with his family to San Francisco, taking with him all of his household furniture. At the time of his abandonment of the property, he left in charge thereof an unpaid and dissatisfied employee, Henry Savio, who remained until November

30, 1920, when he, too, left because plaintiff was owing him a considerable sum for wages which was long past due. Upon Savio's departure, the ranch property was left entirely deserted and uncared for.

During plaintiff's occupancy of the premises he utterly failed and refused to perform nearly every obligation required of him under the contract. Most of his breaches he virtually admits in his testimony upon the trial of this action. These we shall enumerate and discuss later.

EVIDENCE SHOWING PLAINTIFF'S CONDUCT IN CREATING DEBTS DURING HIS OCCUPANCY OF THE PROPERTY.

While plaintiff was in possession of the property, he incurred all manner of debts in the locality in which it is situated. He borrowed money from local banks, which he has never repaid; he contracted large bills for groceries, for meat, hay, furniture, piano, farming implements, and apparently almost everything he used during his occupancy of the property, none of which he has ever paid. These debts aggregated several thousand dollars, and are admitted by plaintiff to be due and owing by him. His testimony in this respect, is as follows:

“Q. Did you owe the Bank of San Jose at that time \$1500, or thereabouts?

A. Yes; it was amply covered by a provision for payments.

Q. Have you ever paid it?

A. Not yet.

Q. Did you owe the Garden City Bank at that time \$2,350, and interest from June 30, 1920?

A. The same answer applies to that.

Q. Have you ever paid it? A. No.

Q. Did you owe the Bean Spray Pump Company \$580?

A. The balance of the amount due on the sprayer, yes, I did owe that.

Q. Did you owe that as a balance due them?

A. Yes.

Q. Did you owe for the tractor \$360?

A. In the same way.

Q. Didn't you owe for groceries \$185?

A. The same answer applies.

Q. Didn't you owe Wilson for groceries at Cupertino \$400 on December 9, 1920, and don't you still owe it to him?

A. That I don't know anything about.

Q. What do you owe him on that?

A. I owed Mr. Wilson, I believe, in the fall; whether he received it I cannot tell you. I am waiting for advice from the Prune Growers Association as to what arrangement was made with that account.

Q. Did you owe the butcher \$50?

A. Yes.

Q. Did you owe the man for hay \$279?

A. Yes.

Q. Did you owe the Madison Furniture Company \$225?

A. I don't know about that amount. I owed them a little.

Q. Did you owe Trunkler Dorman \$130 for merchandise?

A. A small amount, but not \$130.

Q. Did you owe the City Store \$185 for groceries?

A. No; that is a cultivator; it includes tools.

Q. Did you owe the Railroad Company for ties \$10, or thereabouts?

A. Thereabouts. As a matter of fact it is half of that amount.

Q. Did you owe the Sloane Furniture Company? A. I did, at that time.

Q. \$351.69?

A. I think I did, at that time.

Q. You owed Sherman Clay for a piano which was taken away?

A. It was not taken away. I owed them a balance of payment.

The COURT. Q. Had you received any returns that year at all on your crop?

A. No. Small advances were made on the base payment" (Tr. pp. 135-136).

In this connection we wish to call the attention of the Court to the fact that the advances made to plaintiff on the estimates of the amount of fruit which he delivered to the Canneries that year, were in excess of the amount which he was entitled to. This is shown by the testimony of Mr. Spencer, who was in charge of the accounts for the California Cooperative Canneries.

He stated on cross examination:

"Q. Can you from memory state anything about the quantity of fruit that was delivered to you by the plaintiff? Had he instructed you to allocate any of the returns of that fruit to Mr. Warren? A. Yes sir, he had.

Q. Had you done that? A. No sir.

Q. Why didn't you do it?

A. Because we had issued advances to Mr. Bromley in advance of any accounting whatever, with Mr. Warren's knowledge. * * * We made those advances on estimates; in the final account, the *advances made to Bromley were in excess of what would have been coming to him*" (Tr. p. 202).

In addition to this indebtedness, plaintiff was indebted to his workman, Savio, for wages for labor upon this property. Savio having been unable to collect the money due him, presented his claim to the Labor Commission to procure its aid in that behalf. Mr. David J. O'Neil, Deputy Labor Commissioner for San Francisco, stated that on December 4, 1920, he called on plaintiff with reference to the claim of Savio, and at that time he said to plaintiff:

“He (Savio) claims that you owe him \$340. He says: ‘Yes.’ He said he acknowledged owing him this money; at present he was not able to make a payment, but if he ever should be able, he in a position to pay the plaintiff, he would gladly do so” (Tr. p. 207).

EVIDENCE SHOWING PLAINTIFF'S ABANDONMENT.

The undisputed evidence shows, beyond a question of doubt, that when plaintiff abandoned the ranch on October 9, 1920, he had no intention of ever returning or of fulfilling his contract. At that time he was in default for interest amounting to \$773.65 due defendants on the balance of the purchase price of the property, and for taxes amounting to several hundred dollars which defendants had been compelled to pay by reason of plaintiff's failure to do so, as required of him under the contract, and which, under clause 15 of the contract, he was obligated *to immediately refund to them*; he was also in default in many other obligations under the contract, such as replanting trees, plowing, etc. At the time of his abandonment he left the property in care of

an employee whose wages he had not paid, and he also left behind him a large number of other debts which he has never paid.

Plaintiff, himself, testified that he had no intention of returning to the property except on an occasional visit, and that he had no intention of employing any one to care for the place *from November 30, 1920, until February 1, 1921.*

He did not deny that prior to his abandonment of the property, he had stated to Mr. Wilson, owner of a merchandise store at Cupertino, who endeavored to collect a debt owing him from plaintiff, that "the ranch was not profitable—was not a profitable investment" (Tr. p. 112), nor did he deny that to many other people he had expressed his intention of giving up the property; that it was a "white elephant"; that it was "no good"; that he did not intend to put any more money into it, and that he was going elsewhere where he could better his financial condition.

Plaintiff testified, when asked on cross-examination if he had not had a conversation with the defendants in November, 1920, at which time he told them he had no money to pay the balance of the interest due on December 1st, or to care for the property, and that he was going to discharge his man because he could not pay his wages:

"Yes. This probably transpired at the same time—that I was owing my man his wages; that I could not pay him, he would be paid later on; he was leaving me to find work. I also told them that all the work necessary to be done was

finished up to the end of November, or would be, and that I had started my business in the city as a means of obtaining sufficient income to keep myself, and also provide funds for the overhead of that orchard, which was—I believe I used the expression to Mr. Warren—that it was, a ‘white elephant’. I used that expression to other people as well” (Tr. p. 133).

Mr. Archibald Wilson, a witness for defendants, an owner of a merchandise store in Cupertino, testified:

“I saw Mr. Bromley at his ranch on or about the first of October, 1920. I had a conversation with him. * * * I called upon Mr. Bromley with reference to an account owing us. He said in the course of the conversation that he was without funds, and that while he had funds in other countries that he did not propose to invest any more of those funds in the Warren ranch proposition. He also told me that the ranch, to use his own language, was ‘no good’ ” (Tr. p. 215).

Mr. Ralph G. Spencer, a witness for defendants, who has charge of the growers and fruit account of the California Cooperative Canneries, in San Jose, testified that plaintiff called on him in October, 1920, to procure further advances on the fruit which he had delivered to the canneries from this ranch. Mr. Spencer testified:

“Our practice is to make advances as soon as possible; he had had partial returns. I explained that all the advances had been made that could be made at that time, and particularly in view of the fact that under his instructions there was a proportion of it to go to Warren. He said, to my recollection, the substance would be that he was expecting to go to

San Francisco and engage in some other business. He expressed disappointment with the outcome of the transaction. I recall the use of the words 'white elephant' on that occasion. I recall that *he said he expected to leave the place* and go in some other occupation where he could make better returns for himself, to meet his requirements. To the best of my recollection *it was in the early part of October*" (Tr. p. 200).

Miss Maud E. Empey, bookkeeper for Crothers Realty Company, stated that plaintiff called at the office of that company in August or September, 1920, and discussed with her some of his troubles on the ranch. She testified:

"I remember that he said that he wanted to know if the fruit would not be liable for the pickers' charges, and whether they could not look to all fruit,—to Mr. Warren's interest as well as the other, for their compensation; and then he stated that he had spent all of his money, that he was not going to, and no more of his private funds should go into the place" (Tr. pp. 204-205).

And Miss Nola, bookkeeper for Elmer Brothers Nursery, with whom plaintiff had personally placed an order for trees to be planted on this property, and with whom he subsequently,—October, 1920—placed a cancellation of this order, testified:

"Q. Did Mr. Bromley, in connection with the cancellation of that order, make any statement to you, and if so, what?

A. As I recall at the time *he said he was going to leave town*" (Tr. p. 203.)

Mr. Joseph T. Brooks, connected with the Growers' Information Bureau of the California Prune and Apricot Growers' Association, Incorporated, testified:

"I know Mr. Bromley. I have known him since the early part of 1920. In the fall of 1920 I had a conversation with Mr. Bromley in the office of the Association. * * * It was the latter part of October, 1920. *Mr. Bromley stated that he expected to give up the property and go north* because of his circumstances. Because of the financial situation there was a conversation in which the financial situation came in later on, if I am at liberty to state it" (Tr. pp. 205-206).

These facts were known to defendants, and, in conjunction with the many breaches of plaintiff of his contract, his failure to pay the taxes when due, or to reimburse defendants for the payment thereof; his failure to pay the interest due defendants; his failure in every requirement made of him under clause 4 of the contract which provided for the proper care and management of the property, all of which we shall set forth later, and, most important of all, his complete abandonment of the property on October 9, 1920, certainly justified defendants in their belief that plaintiff did not intend to ever return to the place or perform his contract.

Plaintiff's own testimony, on cross-examination, is:

"I moved to San Francisco October 9th. On the 30th of November I had a long talk with Mr. Warren.

Q. Did you tell him in the middle of November, 1920, you and he being present, that you had no money, that you were discharging the man and were quitting the place,—or words to that effect?

A. Certainly not quitting the place. I had no intention of doing such a thing.

Q. Did you tell him you were discharging the man? A. Yes.

Q. To whom did you have reference to when you said you were discharging the man?

A. Savio.

Q. You had no one else there but Savio?

A. No.

Q. Was anyone in occupancy of that place on December 7, 1920?

A. Not to my knowledge.

Q. Was anyone in occupancy of that place at any time between December 1, 1920, and December 8, 1920, to your knowledge?

A. *Mr. Warren had access to the house the whole time*, but no one was living in the house.

* * * * *

Between October 9, 1920, and December 8, 1920, I had moved away nearly all my furniture. What was necessary for that house I had in my house in San Francisco. I know that a ranch needs care.

* * * * *

Q. Between the first of December and the 8th of December how often were you there?

A. I don't think I was there from November 30th.

* * * * *

I made no arrangements for the care of the ranch; there was nothing whatever to do; no work was necessary to be done on the ranch.

* * * * *

Q. What work did you expect to do there and have done during December and February?

A. There was nothing to do.

* * * * *

Q. You had no man in charge of that place during that time? A. No.

* * * * *

Q. Were you there between December and February?

A. There was no need to be there.

Q. Were you there after relinquishing the place?

A. When Warren took possession of the orchard I washed my hands of it, and told him so.

* * * * *

Q. You know there was no one in charge when they made that entry: That you know to be so?

A. No one in charge" (Tr. pp. 108, 109, 124, 126, 128).

In direct and absolute contradiction of the absurd statements of plaintiff that no work was necessary to be done from November 30th until February first, on this ranch comprising fifty-five acres of fruit trees, and valued at \$51,000, is the testimony of Mr. Warren which is proof positive that certain very important and material work was necessary to be done at that particular time:

"When I went there in December 8th, I found that the pruning had to be done. The brush had to be picked up, spraying had to be done. You had to remove old trees, so you could replant others, and get the ground into condition for water when it came down the creek for use. I put three men to pruning. I put one man to picking up the brush. In my opinion as an orchardist that work was abso-

lutely necessary. It takes three men to prune 50 acres about a month and a half. My men were employed there about a month and a half. I paid those men. I picked up brush; took trees out so we could replant, and got the ground in condition so we could begin to irrigate. I removed the trees for planting the other trees, ripped up the ground, preparing it for water; when the water came, I started the pump and was irrigating. I dug up prune and apricot trees. They were girdled with gophers, and I had to take them up. They were dead trees. I replanted 560 trees" (Tr. pp. 176-177).

ENTRY BY DEFENDANTS WAS FOR THE PURPOSE OF PROTECTING THEIR PROPERTY AND IN NO WISE DAMAGED PLAINTIFF, WHO IMMEDIATELY AFTER THEIR RE-ENTRY DECLINED TO RETAKE POSSESSION OR PERFORM HIS OBLIGATIONS.

On December 8, 1920, defendants, knowing that this valuable property had been deserted since November 30th, and that *plaintiff by his own statements*, did not intend to give it any care or attention until February first at the earliest,—a period of at least two months,—deemed it their right and duty to enter upon the premises for the purpose of protecting their own interests therein. Because of plaintiff's conduct, defendants believed that he had no intention of employing any one to look after the property again, or to do so himself, and on December 8, 1920, they notified plaintiff that because of his failure to perform many of his obligations under the contract, they had elected to terminate the contract and had taken possession of the property, treating

moneys theretofore paid on the purchase price as compensation for the rental and occupancy of the land, as provided by section 16 of the agreement.

No reply was made by plaintiff to this notice, and on January 7, 1921,—a month later,—plaintiff stated in the office of defendants' attorney, Mr. E. A. Wilcox, of San Jose, that it was his *intention to give up the ranch, that he did not want it; he was dissatisfied with it, and he would not take it back if it was given to him.* This is shown by the testimony of Mr. Frank G. King, a witness for defendants, and is not denied by plaintiff. Mr. King testified:

“I know Mr. Bromley. I know Mr. Edwin A. Wilcox and have known him a number of years. I had a conversation with Mr. Wilcox, and I took Bromley up to his office; he was evidently dissatisfied with the purchase of his ranch. I had a conversation with Mr. Bromley on or about January 7, 1921. Mr. Bromley stated *it was his intention to give up his ranch, he did not want it; he was dissatisfied with it, and he would not take it back if it was given to him*” (Tr. p. 206).

**PLAINTIFF PERMITS DEFENDANTS TO RE-ENTER, AND THEN
SUES THEM FOR DAMAGES FOR DOING SO.**

Although no reply was made to the notice sent to plaintiff, and although he stated on January 7, 1921, that he would not take back the property or carry out his contract, he subsequently filed an action, similar to the present one, in the Superior Court of Santa Clara County. A demurrer was filed to his

complaint, and was sustained, the Court holding that defendants had not breached their contract by taking possession of the land, but that plaintiff was in default (Tr. pp. 94-95). He later dismissed that action, and on June 27, 1921, commenced another in the District Court, alleging that he was a British subject.

It is admitted by plaintiff that defendants were rightfully in possession of the property up to February 1, 1921. They were there at his request. This is shown by his own testimony and that of Mr. Warren. Plaintiff admitted that he had requested them to look after the property during his absence. He also stated that after he left the property on October 9, 1920, "Mr. Warren had access to the house the whole time" (Tr. p. 108). And prior to his departure from the ranch, he had stated to defendants that if any work was done on the place before February 1, 1921, they would have to do it (Tr. p. 177).

On January 7, 1921,—only one month after defendants' re-entry, *and three weeks before plaintiff, by his own statements, had intended to return to the property*, he had a conversation in the office of Mr. Wilcox, defendants' attorney, in which the property was offered back to him, but which offer he refused. This is shown by his own testimony:

"Q. Did you have a conversation with Mr. Wilcox at that time and place, those persons (Mr. Wilcox, Mr. King and plaintiff) being present, in which you said, in substance, that you would not take back the place as a gift, and

that the personal property on the place which you had left there you cared nothing about; and didn't you state as to the horse that they could do with it as they pleased,—or words to that effect in substance?

A. I would say 'No.' Then I will give my explanation: After considerable conversation with Mr. Wilcox respecting the letter he had written to me, against which I protested, *the conversation turned to, would I take the place back?* I said: '*No, not after this action.*' With reference to my personal belongings, I made the reply: 'Those would be subject to after consideration.' With respect to the horse, I forget exactly my words, but I know everything that was left there on the orchard at the date when Warren and his attorney took that action—

The COURT. (Intg.) *What action are you speaking of?*

A. (Contg.) *Taking possession.* Those articles were subject to the same conditions" (Tr. pp. 219-220).

Thus, according to plaintiff's own admission, he did not want the property. On the contrary, when he was offered possession, he refused it. Up to this date,—January 7, 1921,—he had not claimed any damage by reason of defendants' entry, which entry, as we have shown, was with plaintiff's consent. And indeed, without his consent, defendants had the right, under the circumstances, to enter in order to protect their valuable property from wreck and ruin.

Plaintiff did not only refuse to again enter into possession of the property, but he did not offer to

pay for any of his defaults. At that time there was admittedly due and owing to defendants from plaintiff the moneys paid by them for taxes, which plaintiff had failed to pay, and the interest on the balance of the purchase price; not to speak of plaintiff's neglect in the way of farming the property, which, of course, could not be repaid by money.

BREACHES OF CONTRACT BY PLAINTIFF.

We cannot conceive of a more flagrant violation of a contract than that of plaintiff in the present case. He violated nearly every condition agreed to by him, and then willfully and deliberately abandoned the property, and announced his intention of giving up the property. We desire to set forth with some particularity, the various breaches of plaintiff, as admitted and necessarily implied by the testimony.

(1) Taxes.

Under section 10 of the contract, plaintiff agreed

“to pay all taxes and assessments of whatever description which shall be hereafter assessed against said property until the payment of the full purchase price herein agreed to be paid.”

A serious and inexcusable breach of the contract upon the part of plaintiff, was his total failure to pay either of the two installments of taxes which ac-

crued during the period of his possession. Upon his direct examination (Tr. p. 102) he testified:

“Mr. BARENDT. Q. Did you pay the first installment of taxes on this property, rather the second installment, some time between the first of 1919, and April or May?

A. No; on that occasion I wrote to the Tax Collector asking if he would hold that over.

Q. You are familiar with the method of paying taxes here in two installments,—the fiscal year is from July 1st to June 30th?

A. Yes.

Q. They are payable in two installments?

A. Yes.

Q. When you took possession there would be the second installment coming due in the following spring? A. Yes.

* * * * *

Q. The taxes in November you did not pay?

A. No, I asked them to hold them over with interest until they were due on the next occasion, or when it was convenient for me to pay it.”

When asked whether he had a copy of the letter which he claims to have sent to the tax collector, plaintiff replied that he did not think he had (Tr. p. 116). Granting, however, that he did write such a letter, that would not relieve him. In this State taxes become due and are payable at a certain time, and if they are not paid when due, they become a lien against the property assessed, which can only be extinguished by the payment of the taxes, or by selling the property for non-payment thereof. Plaintiff admits that he failed to pay the two installments of taxes which became due during his occupancy of

the property, and at no time has he offered to reimburse defendants for paying them. Clause 15 of the contract in no way modified the liability of plaintiff to pay the taxes when due, or obviated or excused the breach necessarily arising from non-payment. Clause 15 reads as follows:

“That in the event said party of the second part fails to pay any of the assessments, insurance premiums, liens or encumbrances on or affecting said property *when due*, the parties of the first part retain the privilege of paying the same and upon doing so, said amount or amounts so paid shall thereupon become a part of the principal and shall bear a like interest and *be immediately due and payable.*”

This section must be read in connection with section 10 of the contract, which creates an *unconditional primary obligation* on the part of the plaintiff to pay all taxes assessed against the property. It must likewise be read in connection with section 17, which makes *time of the essence of the contract*. The obvious purpose of section 15 was to safeguard the property against liens and encumbrances resulting from non-payment of taxes, by permitting defendants to pay them in the event of plaintiff's failure to do so; and, further, to provide for the *immediate* reimbursement of defendants in case they should pay the taxes. No other construction can be placed upon this clause of the contract. It was not intended that plaintiff should be permitted to defer his payments of taxes for a period of five years, throwing the entire burden and responsibility for

the payment thereof during the whole of that time upon the defendants, without immediately reimbursing them for the amounts so paid. Yet this is the attitude of plaintiff assumed in this action. Notwithstanding the fact that by his own admissions he failed to pay any taxes which became due during his occupancy of the property, as called for by the contract, and that he has never at any time offered to reimburse defendants for the amounts which they paid therefor in order to save the property, he contends that he has fully performed all the terms and conditions of the contract on his part to be performed. The payment of taxes was a very material obligation upon the part of plaintiff, and his failure to perform that obligation either by the payment of taxes or by the immediate reimbursement to defendants of the amounts paid by them, was a serious breach of his contract.

(2) Interest.

Under section 3 of the contract plaintiff was required to pay interest on the unpaid portion of the purchase price *annually* at the rate of 6 per cent. The sum of \$6000 had been paid by plaintiff upon execution of the contract. This left a balance of \$45,000 still to be paid on the purchase price. Therefore, on December 1, 1920, the sum of \$2700 was admittedly due defendants as interest. Plaintiff admitted, upon cross-examination, that he had made no direct payments of interest whatsoever to the defendants.

“Mr. SCHLESINGER. Q. Did you pay any interest outside of the credit being allowed for the fruit which was sold to the canneries, have you paid any interest?

The COURT. Outside of that which would be derived from the receipt of the fruit?

A. No, unless the moneys received from the sale of the grapes are paid against the interest accruing” (Tr. p. 118).

But plaintiff would contend that by virtue of two provisions of the contract, to wit: Section 3 and section 7, he was relieved of all obligation to make direct payments of interest to the defendants when due.

Section 3 reads as follows:

“The balance of said purchase price, to wit: the sum of Forty-five Thousand (\$45,000) Dollars shall be paid in lawful money of the United States of America on or before five years from this date, together with interest thereon from date until paid at the rate of six per cent net per annum, *payable annually*, and if not paid as it becomes due, it shall be added to the principal, become a part thereof and thereafter bear interest at the same rate” (Tr. p. 13).

Section 7 reads as follows:

“It is understood and agreed that when said crop is ready for the market, the party of the second part will notify the parties of the first part that he is ready to sell and state the price at which he is willing to sell, and if said price is the market price for the fruit at that time, the parties hereto agree to consent to the sale of said fruit and shall thereupon sell said fruit in

the joint names of the parties of the first part and the party of the second part in the proportion of 60% in the name of the parties of the first part and 40% in the name of the party of the second part, and the portion which shall go to the parties of the first part shall be by them credited on unpaid interest and the balance on the principal hereof, as herein agreed" (Tr. p. 14).

In a contract, such as the one here under discussion, which contains a clause (section 3 quoted above) specifically making interest "*payable annually,*" and in which *time has been expressly made of the essence* (section 17), provisions like those mentioned above are not to be so interpreted as to relieve plaintiff of his obligation to make direct payment of interest himself when due. Such an interpretation would amount to a gross violation of the obvious intention of the parties.

If clause 3 were so interpreted as to obviate or excuse the breach which would otherwise be occasioned by non-payment of interest *when due*, it would in effect destroy the primary and unconditional liability of plaintiff to pay the interest "*annually,*" that is, *on time*, and would reduce his obligation to a mere requirement to pay interest *at any time within five years*. Such an interpretation would likewise render nugatory section 17, which makes time of the essence of the contract. Where time has been expressly made of the essence of the contract, that urgency, whether or not it exists in fact, must be conclusively presumed. This, we submit, is the

inherent meaning of a clause making time of the essence.

Clause 7 was not meant to obviate the requirement of *direct* payment of interest *by the plaintiff himself* when due. That clause provides that "the portion which shall go to the parties of the first part shall be by them *credited* on *unpaid* interest and the *balance* on the *principal thereof* as herein agreed." "*Unpaid interest*": If the parties did not contemplate the *direct* payment of interest *when due, by plaintiff himself* to the defendants as the proper and normal mode of paying the interest, why then, did they employ the expression "*unpaid interest.*"

The amounts of money to be credited to the plaintiff as interest, and the times at which money to be so credited would be received by the defendants, were necessarily uncertain by reason of that method of disposing of the crops which the parties had agreed upon. This uncertainty was doubtless within the knowledge of the parties. It cannot be fairly argued that an obligation to pay definite amounts of interest at definite times (as provided in section 3 of the contract) could be fully and satisfactorily met by an indirect mode of payment, very uncertain both as to time and amounts. Such was obviously not the intention of the parties, particularly in view of section 17, making time of the essence. The clear purpose of section 7 was not to relieve plaintiff of his obligation to pay interest himself directly and promptly when due by setting up another plan whereby he might properly meet this

obligation, but merely to secure the defendants *in the event of plaintiff's default*.

Mr. Warren testified that the total amount which he received from all fruits sold in 1920, being the 60% provided for in the agreement, was \$1926.35. (Tr. p. 184).

This left unpaid on December 1, 1920, \$773.65 of the amount due as interest on that date. There is nothing in the testimony indicating that at any time thereafter defendants actually received any additional sums of money; and even if they had, this would not have excused plaintiff's breach because time had been expressly made of the essence of the contract. At no time was this unpaid interest tendered to defendants, or any offer made by plaintiff to pay the same.

We submit, that this contract contains but one engagement on the part of plaintiff with respect of the payment of interest, and that is, that plaintiff shall pay the interest annually when due. The provision that the title to 60% of the crops grown on the orchard each year shall remain to the credit of defendants toward the payment of interest, is solely for the purpose of securing defendants for the interest to that extent, but does not in anywise relieve plaintiff from his obligation to pay the full amount of interest annually when it became due.

Under clause 4 of the contract, plaintiff was required, and agreed, to do certain particular things. The evidence shows conclusively that he failed in each one of these requirements.

(3) Farming premises in a first-class, farmerlike, orchardist-like manner.

Under this clause of the contract, plaintiff was required to farm the premises in a first-class, farmerlike, and orchardistlike manner. This he utterly failed to do. His attempt to vindicate himself for his complete failure in this respect by stating that he was not an expert orchardist, should not relieve him of his responsibility. He stated that he had had some previous experience as an orchardist, and as such had been successful. However, his experience or inexperience in that respect, has nothing whatever to do with the terms and conditions of this contract. He voluntarily executed the contract, assuming the obligations called for by it, and we submit that it was his duty, under the circumstances, if he felt himself personally incapable of operating the ranch in compliance with the terms of the contract, to have secured proper advice and adequate labor for that purpose. He, however, not only failed to do this, but refused, in many instances, to heed the advice which was gratuitously offered to him by Mr. Warren, Herbert Pash, and others, who were expert orchardists.

Mr. Warren testified that upon many occasions he attempted to advise plaintiff as to the proper manner of irrigating the ranch, and upon each occasion plaintiff would reply that he would take care of the ranch (Tr. p. 217). And Mr. Herbert Pash,

a witness for defendants, on cross-examination, stated:

"I am a friend of Mr. Bromley's. I paid him friendly visits from March to October. Mr. Bromley asked my advice, and after I gave it, he argued on it. He did not follow my advice."

Mr. Pash, who is an expert orchardist, testified on direct examination that he had lived just across the road from this ranch for a period of twenty years, and was thoroughly acquainted with it, and that during the occupancy by plaintiff he visited the ranch about fourteen or fifteen times. He further stated:

"Q. What did you observe on those visits?

A. I noticed the result of the irrigation, and the method of preserving the moisture in the soil. I noticed the condition of the trees, and the condition of the soil.

Q. What in your opinion, was it as to his management, as to being farmerlike or orchardistlike?

A. *To my idea it was very unfarmer-like.* He did not do what I would have done; and he did what I should not have done.

* * * * *

Mr. SCHLESINGER. Q. What did you see with respect to the trees and general conditions?

A. I noticed that the trees were suffering from want of moisture. The fruit in July apparently had suffered from loss of moisture and had dropped. *The reason of the loss of moisture was the way the orchard was cultivated*" (Tr. pp. 209-210).

Plaintiff utterly failed to do any plowing whatsoever. On a ranch of this character, it is abso-

lutely imperative in order to farm it properly, that plowing should be done. Mr. Warren, who had owned the ranch for eleven years and had farmed it successfully during the whole of that time, testified:

“The place was not plowed in 1920. Part of it was double disced two or three times, the other part once. About one-half of it was double disced” (Tr. p. 175).

* * * * *

“In February, 1920, Mr. Bromley had not plowed that place. In February, March or April of 1920, Bromley used what we call a disc harrow. It is not the equivalent to plowing. The proper treatment between December and April of 1920 of that soil would be to plow it first, then you can use a disc harrow, or disc cultivator after that to keep the ground mixed. The purpose of plowing is to stir up the ground thoroughly and turn it over, so that the ground may be turned up to the sun, to stir up the hard dry fields there, packed from the rains during the winter. The effect of the lack of that on the part of Mr. Bromley on the prune production was that the moisture goes out of the ground when you do not plow that with a cultivator thoroughly, and the fruit does not mature and the trees suffer very materially” (Tr. pp. 183-184).

I. Okumura, a witness for defendants, who worked for plaintiff from December 1, 1919, until April 11, 1920, testified:

“While I was there Mr. Bromley did not do any plowing on the place. The proper time for plowing was about the first of February. I talked with Mr. Bromley about plowing. He said: No plowing, just discing and harrowing.

* * * I had a talk with him about that. I

says: Better plow first, then with a disc, then after with the spring cultivator" (Tr. p. 218).

Plaintiff admitted on cross-examination that he failed to cultivate or irrigate one and one-half acres of walnut trees, and seeks to excuse himself therefor by stating that this portion of the ranch had been "roughly plowed in the wet season and left in that condition and the furrows were as hard as bricks" (Tr. p. 106).

This excuse is certainly not justified, inasmuch as plaintiff himself was in possession of this land during the wet season, having entered on December 1, 1919, and if the ground was in the condition which he stated, he alone was responsible therefor. He had ample opportunity to cultivate it at the proper time and in the proper manner.

As to his obligation "to spray the pear trees each year as often as it is customary so to do", plaintiff admitted on cross-examination that he only sprayed the pear trees twice during the entire season; once in February and again on May 18th, and that he did no spraying after that. That was the extent of his performance in that regard.

As to plaintiff's mismanagement of the property during his possession, Mr. Warren testified:

"When I turned the orchard over to Mr. Bromley it was in first-class condition, and the year prior produced \$19,000. When I re-entered the place it was very much neglected.
* * * *He did not succeed in raising crops the equal of any produced on similarly situated land. His acts did not increase the value of*

that land. *His acts decreased the value of the land to the extent it will take me five years at least to put it back into the condition it was when he received it*" (Tr. p. 184).

It is very significant that plaintiff did not call as a witness to testify in his behalf as to his management and care of the property, his former employee, Savio. The testimony of his other employee, Okumura, was very much to his discredit.

(4) Removal of dead trees.

Under clause 4 of the contract, plaintiff was required to "remove all dead trees".

It is clear from the evidence that he did not comply with this condition of the contract. His own testimony in this respect was very indefinite and evasive. When asked on direct examination if he had removed any of the dead trees, he replied, "I removed some of the dead trees" (Tr. p. 106). The testimony of Mr. Warren, however, of the work which he found it necessary to do upon the land immediately after re-entering, is very definite, and to our minds, conclusive, upon this subject. He testified:

"I had to remove old trees, so you could replant others, and get the ground into condition for water when it came down the creek for use. * * * I picked up brush; took trees out, so we could replant, and got the ground in condition so we could begin to irrigate. I removed the trees for planting the other trees, ripped up the ground, preparing it for water; when the water came, I started the pump and was irrigating. I dug up prune and apricot trees. They were girdled

with gophers, and I had to take them up. They were dead trees. I replanted 560 trees. Not to my knowledge had there been any trees replanted or dead trees dug up during the time of Bromley's occupancy. There were no trees replanted. I don't think any dead trees had been dug up. I examined the place" (Tr. p. 177).

In view of Mr. Warren's testimony, which has not in any wise been controverted, together with plaintiff's statement that he removed only *some* of the dead trees, and the fact that he offered no excuse whatever for his failure to remove the remainder, we submit that plaintiff clearly violated this provision of the contract.

(5) Replanting.

Under clause 4, plaintiff was required to "remove all dead trees, and as soon as customary thereafter replant the same with apricot or prune trees".

According to plaintiff's own testimony, he did not replant any trees whatsoever. He testified (Tr. p. 130) :

"After removing the dead trees *I did not replant any trees.* I ordered trees for replanting and cancelled the order.

* * * * *

I don't know how many trees should have been replanted in lieu of the dead ones, but I bought 300 trees, and that is the order I had cancelled."

There could not possibly have been any question as to the great necessity for replanting trees. As

we have pointed out, there was a large number of dead trees on the land, and it was plaintiff's duty under the contract, to remove these and replant others. This he utterly failed to do.

Mr. Warren testified that immediately after his re-entry upon the land, he replanted over 560 trees (Tr. p. 177). Plaintiff fully realized the necessity for replanting trees, for on July 26, 1920, he placed an order for 300 trees with the Elmer Brothers nursery in San Jose. Subsequently, however, on October 20, 1920, *after he had left the ranch* and moved his family and all of his furniture away, he cancelled this order. His answers to the questions propounded to him upon this subject, were as evasive as his answers to almost every other question asked him during his entire examination. He testified on cross-examination:

"I know the concern of Elmer Brothers, nurserymen in San Jose. On July 26, 1920, I believe I left an order with them for 300 trees. I wanted to comply with my contract concerning replanting.

Q. Did you subsequently, on the 20th day of October, 1920, cancel that order, stating to the young lady who was the bookkeeper there, that you wanted to cancel the order because you no longer had any use for the trees, as you intended to leave the country—answer 'yes' or 'no'.

A. No. If I may be allowed to explain, I cannot give you the exact date, it was young Elmer himself I saw; it was on one of my visits to San Jose; it was after Christmas, I think in January, I told him that I should not need those trees, could he cancel the order.

The COURT. Q. When were the trees ordered for?

A. As soon as possible; when the proper time for planting came.

Q. At the time when you gave the order?

A. When the rain comes.

Mr. SCHLESINGER. Q. Didn't you, as a matter of fact, cancel the order for those trees on or about the 20th day of October, 1920?

A. I don't think so. I think the order was cancelled after Christmas, when I saw young Elmer himself. It was when I visited San Jose, after I had been living in the city here.

Q. Don't you know that you cancelled that order after you left San Jose with your family, taking with you your household furniture—wasn't it shortly after that time you cancelled the order for the trees?

A. After I left San Jose, yes'' (Tr. pp. 110-111).

Although plaintiff testified that he kept a diary stating from day to day what he did on the orchard, and made entries therein each night (Tr. p. 97), and was permitted by the trial Court to read therefrom, he does not seem to have entered therein the date upon which he cancelled the order for the 300 trees which he had previously given. He realized at the trial of this case, that it would be greatly to his advantage if he could make it appear that he had not cancelled the order until after Christmas, because the fact that he cancelled it only a few days subsequent to his removal from the ranch, *revealed all too clearly that it was done in furtherance of his plan to abandon the ranch.* The testimony of both plaintiff and defendants shows that he left on October 8, 1920, taking with him his family and all of

his household furniture. *The order for trees was cancelled on October 20, 1920.*

Although plaintiff endeavored very assiduously to avoid admitting that he had cancelled the order for trees in October, 1920, and to make it appear that he had not done so until after Christmas, the evidence on this point is definitely and conclusively established by the testimony of Miss Nola, book-keeper for Elmer Brothers Nursery, with whom plaintiff placed the order for the trees, and also with whom he personally placed the order for cancellation thereof. This witness testified:

“Mr. SCHLESINGER. Q. Do you know F. G. Bromley?

A. Yes.

Q. Did your concern receive any order from Bromley?

A. Yes, but it was cancelled.

Q. When was the order for these trees cancelled?

Mr. BARENDT. If you know, of your own knowledge.

A. *On October, 1920; I put it on the card myself.*

Mr. SCHLESINGER. Q. Did Mr. Bromley, in connection with the cancellation of that order, make any statement to you, and, if so, what?

A. As I recall at the time *he said he was going to leave town.*” (Tr. p. 203.)

Therefore, it is shown by the undisputed testimony that plaintiff utterly failed to comply with the provision of the contract requiring him to replant trees. He offered no excuse whatever for his failure to do so, and, we submit, that this breach

constituted a serious violation of the provisions of the contract.

(6) **Irrigation.**

Under section 4, plaintiff was required to irrigate the orchard each year when the water was available. The testimony clearly shows that he failed to irrigate *large portions of the land*; that he failed to heed the advice given him by experienced orchardists with regard to irrigation, and that he worked relatively short hours at a time when it was imperative to work very long hours in order to utilize fully the water supply at hand. Mr. Herbert Pash, who frequently visited the ranch while plaintiff occupied it, testified:

“Mr. SCHLESINGER. Q. What did you see with respect to the trees and general conditions?

A. I noticed that the trees were suffering from want of moisture. The fruit in July apparently had suffered from loss of moisture and had dropped. The reason of the loss of moisture was the way the orchard was cultivated.

* * * * *

The consequence of not having water in the soil on his prune trees on the flat caused them, in my opinion, to drop in July.

* * * * *

In fact, to put it in a few words: The orchard was suffering from lack of moisture. *He could have put the moisture on if he wanted to. There was water enough in the creek to irrigate the whole place over.*”

We next quote from the testimony of Mr. Warren:

“There was water available for the adequate irrigation of that ranch during the year 1920. Mr. Bromley irrigated about one-third of the place fairly well, and about one-half of the place,—that is, I should say about one-half of the place was irrigated partially. *You might say one-fourth of the place was irrigated fairly well.* He did not succeed in raising crops the equal of any produced on similarly situated land” (Tr. p. 184).

“Mr. SCHLESINGER. Q. Were you familiar with the water there during the year 1920?

A. Yes.

* * * * *

There was plenty of water. *Of course, in a year like that you have to use your common judgment, and work long days and nights, so as to be sure you are going to get the water.*

Q. Did you have any conversation during the year 1920 upon that subject with Mr. Bromley?

A. A great, great many of them; *about once a week during that season I talked to Bromley about water.*

Q. What did you say?

A. I said, ‘Mr. Bromley, you ought to work longer days, and ought to work nights, to be sure you are going to get plenty of water for the ranch’. I said: ‘If it runs later on so much the better, but be sure you get enough water’. He said *he would take care of the ranch; that is all I could get out of Bromley on any of my talks to him*” (Tr. pp. 216-217).

I. Okumura, who had worked eleven years for defendants and from December, 1919, to April, 1920, for plaintiff, testified as follows:

“The water conditions there from the first of January, February and March there was

plenty of water in the creek. *He started at 10 o'clock and quit at 5 o'clock at night.*

Mr. SCHLESINGER. Q. Did you have any talk with him about pumping the water, about starting the motor?

A. Yes, starting the motor; the first time I worked for Mr. Bromley I start the motor 7 o'clock myself. Then Bromley says: 'Do not start so early'. So I start the motor myself; he did not start the motor before 10 o'clock.

Q. What time should the motor have been started?

A. The motor should have been started about 5 o'clock in the morning; quit about half-past eight; plenty of water in the creek then; bye-and-bye, not so much.

Q. You say there was plenty of water in January, February and March?

A. Yes" (Tr. pp. 218-219).

Plaintiff sought to justify his breach in regard to irrigation by claiming that there was not sufficient water available. But the testimony shows that the supply of water was adequate, and that the failure to irrigate properly resulted rather from too short hours, insufficient effort, and lack of interest and proper management on the part of plaintiff. He attributed his failure to irrigate properly in part, to the age and condition of the pump; but he fails to show that he ever employed anyone to overhaul or repair it. Furthermore, Mr. Warren used this same pump in the previous year and the ranch produced in that year the sum of \$19,700.

(7) Pruning.

Under clause 4, plaintiff was bound to "prune said trees at the proper time each year and so far

as is possible remove all borers from the roots of the same”.

On cross-examination, Mr. Warren testified:

“Q. Did you ever say anything to Bromley about pruning in November?

A. I spoke to him about the way his man was pruning the trees in November, 1920.

Q. Then he was pruning in 1920?

A. The man was cutting trees to pieces in a most ridiculous manner. * * * His man would go out and prune a tree here and go off in another part of the orchard and prune a tree, and cut the trees up to pieces. I do not call that pruning. His man admitted to me he did not know anything about orchard work, and Mr. Bromley admitted it to me” (Tr. p. 191).

Plaintiff admitted on direct examination, that the pruning of the orchard during his occupancy was improperly done (Tr. p. 101). He attempts, however, to justify this breach by laying the blame upon his employee. However, under the contract, plaintiff was required, regardless of the extent of his own personal experience, to provide first-class farmer-like, orchardist-like management of the ranch. It must be presumed that he knew and understood the obligations which he was assuming at the time he executed the contract, and he certainly should have used his best endeavors to have fulfilled those obligations. He could hardly expect the defendants, who had far more at stake in the premises than he, to be the only sufferers for his failure to do the things which he was required under his contract to do.

It is thus shown by the evidence that plaintiff violated nearly every provision of the contract. His mismanagement of the ranch during his possession, resulted in much damage to the property, and in a great loss during that year on the income therefrom. It was shown that in 1919,—the year prior to the possession by plaintiff, the ranch earned \$19,700. In the year 1918 it produced about \$7000, and in 1917 about \$6000. In 1920, however, the year which plaintiff was in possession, the defendants received as sixty per cent of the total yield of the crops the sum of \$1926.35. Plaintiff received forty per cent. By computation, therefore, the total yield for the year 1920 was approximately \$3210,—or less than one-half of the average yield of the ranch under the management of defendants.

And not only did plaintiff violate his contract during his possession, but as we have shown he abandoned the property on October 8, 1920, and took up his residence in San Francisco, leaving the place in the care of Henry Savio, an employee, who, on November 30th, also abandoned it because of plaintiff's failure to pay him his wages. The place was then left entirely without care or attention.

Mr. Warren testified:

“I re-entered that place on December 8, 1920.
* * * I entered the place because it was not being taken care of. There was no one on the place. I had to look after my own interest. I had a conversation with Bromley prior to re-entering. I had one, the last one I had with him was in the latter part of November, 1920,

and Mr. and Mrs. Warren were present. Mr. Bromley on that occasion said: 'I came down to see you if you would not do the work on the place'. I says: 'Mr. Bromley, I have more work than I can really attend to myself; I am not going out to work for somebody else.' He said, 'I am going over to tell my man to leave, *and if anybody does any work on the place before February, you will have to do it*.'"

* * * * *

"When I entered the house on that land the house was open; the doors were unlocked; some of the doors were open. There was no one in charge" (Tr. pp. 177, 178).

ARGUMENT.

As we have pointed out, plaintiff entered into an express agreement with defendants for the purchase of this property, and agreed to do certain particular things at certain times. He did not perform his contract, but deliberately ignored and violated it. He now seeks to make his own inexcusable conduct a shield against consequences which ordinarily fall upon one so negligent of his obligations, and to obtain financial reward for his deliberate violation of his contract.

THE CONDUCT OF DEFENDANTS IN ENTERING THE PROPERTY CONSTITUTED NEITHER A BREACH NOR A RESCISSION OF THE CONTRACT.

The evidence clearly and conclusively shows that defendants re-entered the property only after many serious breaches upon the part of plaintiff of his

contract, and after his abandonment of the property. They did not re-enter “wrongfully and unlawfully and without the knowledge or consent of plaintiff”, as alleged in his complaint, but rather at the solicitation and request of plaintiff.

We have enumerated plaintiff’s many breaches, and have shown his intentions with respect of the contract, as evidenced by his conduct and his statements, prior to the re-entry by defendants. The undisputed evidence conclusively shows that plaintiff did not endeavor or intend to fulfill his agreement, but that after having had the use and occupation of the property for one year, with forty per cent of the income therefrom to his own use and benefit, and incurring bills, which he has never paid, to meet his every requirement while in possession, he deliberately abandoned the property, after stating to several people that he did not intend to keep it.

Under these circumstances defendants were entitled to re-enter and protect their rights in the property, and their conduct in so doing constituted no rescission or breach of the contract. The notice sent to plaintiff by defendants’ attorney, reads:

“Mr. and Mrs. Chas. E. Warren have requested me to notify you *that owing to your failure to perform many of the terms and conditions on your part to be performed in their agreement to sell and your agreement to buy* * * * they have elected to terminate the agreement, and have taken possession of the property. All moneys heretofore paid on the purchase price will be treated as compensa-

tion for the rental and occupancy of the land, as provided by section 16 of the agreement."

This was clearly not a rescission. Defendants merely exercised the right given them under clause 16 of the contract to terminate all of plaintiff's rights in and to the property because of his breaches and abandonment.

Clause 16 reads:

"That in the event said party of the second part fails to perform any of the terms and conditions of this agreement, or shall make default in any payment of principal or interest, then all of the rights of the party of the second part hereto shall terminate and all payments theretofore made shall be retained by the said parties of the first part and treated as compensation for the rental and occupancy of the said land up to the time of such default" (Tr. p. 17).

In perhaps the latest decision in this state upon this question, appearing in *Catterlin v. Peterson*, 40 Cal. App. Dec. 261 (advance sheet of February 7, 1923), the Court held:

"The law appears to be well settled that, in the absence of an express provision in the contract of the parties to the contrary, on a default by the vendee, without legal excuse for such default, whether by waiver on the part of the vendor or otherwise, the vendor is under no obligation to give notice to the vendee of his termination of his rights under the contract. *Commercial Bank v. Weldon*, 148 Cal. 608; *Champion Gold Mining Co. v. Champion Mines*, 164 Cal. 205; *Schwerin Estate Realty Co. v. Slye*, 173 Cal. 172; *Newhall L. & F. Co.*

v. Burns, 31 Cal. App. 549.) But 'if the vendee, in fact, has been in default, a notice that the contract was terminated would have been proper, *and the vendors would be no longer bound, either to convey the land or refund the purchase money.* Such notice would have been in strict accord with the contract' (citing cases). (Lemle v. Barry, 181 Cal. 10.)
 * * * * *

The case of Champion Gold Mining Co. v. Champion Mines, *supra*, also involved a principle of law similar to that in this case. There a mining property had been sold on the same plan pursued in this case, that is, on the instalment plan. The vendee had breached the contract by not making the payments agreed upon and, after some negotiations, as here, the vendor, a corporation, at a regular meeting of the board of directors thereof, adopted a resolution containing, in part, the following: 'Now, therefore, it is hereby resolved, that said agreement be, and it is hereby terminated and cancelled, and * * * be and he is hereby authorized and directed for and on behalf of this corporation, and as its act and deed, to immediately take possession of all the properties of this corporation covered by said contract'. A certified copy of the resolution referred to was delivered to the vendee. Some subsequent attempt to adjust conditions between the parties proved unsuccessful, and the vendee instituted an action to recover possession of the property and damages for the detention thereof. In holding that plaintiff (the vendee) could not recover, the court said, in part: 'We do not understand that any notice was essential to terminate plaintiff's rights under the contract. *Its default, unexcused and not waived, ipso facto terminated those rights,* and practically the only effect of the resolution was to express the determination of defend-

ant corporation not to waive such default and that the contract was, by reason of the default, terminated, and to authorize the designated officer for and in its name to retake possession'.

It is a general rule that there is no presumption in favor of an abandonment and that clear proof thereof will be required. * * * In the opinion of the court, there was no rescission or abandonment of the contract by plaintiff. He stood squarely and firmly on the terms of his written contract; he was not in default at any time with reference to anything by him to be done or performed. On the other hand, the vendees were in default; they showed no inclination to abide by the terms of their obligation to plaintiff; there was no legal excuse for their conduct because of waiver on the part of plaintiff or otherwise; *consequently they are in no position to recover any moneys paid to plaintiff on account of the purchase price.*"

Plaintiff, by his breaches, had surrendered all of his rights under the contract. His right of possession existed only under and by virtue of the contract; therefore, when his rights terminated by reason of his violation of its terms, he had no further right of possession.

The very recent case of *Los Angeles Investment Co. v. Wilson*, 39 Cal. App. Dec. 600, is decisive of of defendants' rights in the present case. The Court held:

" 'The plaintiff's notice of forfeiture and demand for the restitution of the property *were not* (as was said in the opinion in *Oursler v. Thacher*, 152 Cal. 745), *a repudiation or abandonment of the contract or a consent to a rescis-*

sion thereof, any more than was the refusal of the vendor to convey in *Glock v. Howard & W. Colony Co.*, 123 Cal. 1, an abandonment or a consent to a rescission.'

In *Newell v. E. B. & A. L. Stone Co.*, 181 Cal. 385, * * * Discussing the effect of this notice, the court said: 'The mere fact that the vendor may have been in error in supposing and declaring that unless immediate payment were made of the entire balance of the purchase price it could consider the rights of the vendee foreclosed does not convert the notice into a declaration that the vendor elected to rescind. On the contrary, defendant sought to stand upon the contract and to enforce its terms. * * * *Plaintiff was in default when the notice was received by him.* True, his prior defaults had been condoned, and he could have reinstated himself by making prompt payments of the balance due under the terms of the contract, *but he could not, by merely saying nothing, gain the right to demand repayment of the installments of the purchase price previously made. He could not place defendant in default unless he at least tendered to defendant all that was due under the agreement up to the date of his offer*'.

* * * * *

It is true that the notice and demand served by the plaintiff on May 11, 1920, demanding payment of the amount of instalments then due, and that such payment be made on or before the 22nd day of that month, did not directly offer to restore possession to the vendee, if such payment be made. *But the notice and demand were not necessary. The vendee being in default, the vendor might have held possession, lawfully, without any affirmative action.* (*Glock v. Howard, etc. Co.*, 123 Cal. 1.) The notice of May 11, 1920, was a voluntary offer, not constituting a waiver of default, un-

less accepted. If in response to that offer payment of the demanded sum had been made, the vendee then would have been entitled to be restored to possession."

In *List v. Moore*, 20 Cal. App. 620, a case very similar to the present case, where the purchaser was in default and the contract contained a provision that if he should default, all of his rights in the property would be forfeited, the vendor sent him a notice that the contract was at an end. In that case the Court held:

"But the only fair interpretation of the notice here, *considered in connection with the terms of the contract*, is that no further affirmative action should be taken by either party to execute said contract, and that the status of each should remain as provided without further change. It is true that rescission as well as an abandonment of a contract may be shown by circumstantial or direct evidence, or both, *but the facts, fairly considered, do not compel the conclusion*, in opposition to the finding of the court, *that the owner of the land was so gratuitously generous as to voluntarily surrender the valuable right secured to her by the terms of the contract.*"

The terms of the contract in question especially provided that if plaintiff should make default in *any* of the conditions of the contract, all of his rights thereunder should terminate and all payments made by him should be treated as compensation for rental and occupancy of the land.

In the case of *Hansborough v. Peck*, 72 U. S. 497, 18 L. Ed. 522, it was held that even if no such clause

had been embodied in the contract, defendants would have had the right to enter upon the premises and to retain all moneys theretofore paid by plaintiff, by reason of his default. In that case the Court said:

“The position is, that *there is no longer a subsisting contract, as an end has been put to it by the vendor*, and he has in consequence resumed the possession, and claims to hold the estate the same as if no contract had ever existed, and that in such case the purchaser, upon settled principles of law and equity, is at liberty to recover back the consideration paid and the value of the improvements. But the difficulty is, that the vendor *has only availed himself of a provision of the contract, which entitled him to proceed in a court of chancery, by reason of the default of the purchaser* making his payments, to put an end to it and be restored to the possession. *It is a proceeding in affirmance, not in rescission of it, by enforcing a remedy expressly reserved in it.* Indeed, without such clause or reservation, the remedy would have been equally available to him. *It is a right growing out of the default of the purchaser*, as the law will not permit him both to withhold the purchase money and keep possession and enjoy the rents and profits of the estate; nor will it subject the vendor to the return of the purchase money if he is obliged to go into a court of equity to be restored to the possession.

* * * * *

This mode of selling real estate in the United States is a very common and favorite one, and the principles governing the contract, both in law and equity, are more fully and perfectly settled than in England or any other country. * * * And no rule in respect to the contract is better settled than this: that the party who has

advanced money, or done an act in part performance of the agreement, and *then stops short and refuses to proceed to its ultimate conclusion*, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, *will not be permitted to recover back what has thus been advanced or done.* Green v. Green, 9 Cow. 46; Ketchum v. Evertson, 13 Johns. 364; Leonard v. Morgan, 6 Gray 412; Haynes v. Hart, 42 Barb. 58."

UNDER THE CONTRACT, UPON VIOLATION OF ANY OF THE CONDITIONS THEREOF BY PLAINTIFF, DEFENDANTS HAD THE RIGHT TO RETAIN ALL PAYMENTS THERETOFORE MADE AS COMPENSATION FOR RENTAL AND OCCUPANCY OF THE PREMISES.

This contract was an entirety, and a breach by plaintiff of any one of its conditions was a breach of the whole, and discharged defendants from any further obligations thereunder. It gave them a complete right of action.

On December 8, 1920, at the time defendants took possession of the property, plaintiff was in default in the payment of interest amounting to \$773.65. He was also in default in the matter of taxes, which was indeed a very important obligation upon his part which he utterly failed to perform. Under clause 10 of the contract (Tr. p. 15) plaintiff was required to pay all taxes against the property until the payment of the full purchase price. This he failed to do. Two installments of taxes became due during his possession, and he did not pay either of them. On the last day upon which taxes were pay-

able before becoming delinquent, defendants paid them in order to save the property. The taxes on this property amounted to several hundred dollars. Clause 15 of the contract provides that

“in the event said party of the second part (plaintiff) fails to pay any of the assessments, * * * affecting said property *when due*, the parties of the first part (defendants) retain the privilege of paying the same and upon doing so, said amount or amounts so paid shall there-upon become a part of the principal and shall bear a like interest and be *immediately due and payable*” (Tr. p. 17).

Plaintiff not only failed to pay the taxes *when due*, but *he has never reimbursed defendants for the payment thereof*, which by an express provision of the contract he was required to do,—the contract providing, as we have shown, that such amounts paid by defendants for taxes, in the event of plaintiff’s failure to pay them when due, should become *immediately due and payable to them*. Nor has plaintiff ever offered to reimburse defendants for these moneys, nor offered an excuse for his default. This was a gross violation of his contract.

Clause 17 of the contract (Tr. p. 17) expressly provides that “time is and shall be the essence of this contract.” Plaintiff was long in default in the payment of interest and taxes. In the recent case of *Schwerin Estate Realty Co. v. Slye*, 173 Cal. 172, the Court said:

“Time was expressly made of the essence of the agreement of January 18, 1913, and failure to perform by defendants, under the terms of

said contract, would work a forfeiture of all rights of the vendees leaving the sums previously paid in the possession of the vendor as liquidated damages. We cannot escape from the conclusion that *by failing to prove their readiness, ability, and willingness to perform their part of the contract within the time limited therein the defendants utterly failed to establish their right to any relief.* * * *

Under the terms of the contract no affirmative act on the part of the vendor was necessary to place the vendees in default. It expressly made failure to comply with its terms within the time limited 'by the parties of the second part' * * * an automatic termination of all of the vendor's obligations in law and equity. Of this agreement it may be said, just as Mr. Justice Henshaw said in *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1-16: 'In the case at bar the payment of the final amount under the contract, at the time and in the manner agreed upon was a condition precedent to the right of the vendee to demand a conveyance. Upon his failure to make payment the vendee committed a breach and no affirmative act upon the part of the vendor was necessary to bring about this result.'

* * * * *

If the vendees had desired to consummate the contract or to recover back their deposit they should have made a tender of the balance due and should have demanded performance by the vendor. Not having done this they are not in a position to demand the relief for which they have prayed."

And in *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 14, Mr. Justice Henshaw, quoting from the

decision of Lord Loughborough in *Lloyd v. Collett*, 4 Bro. C. C. 469, said:

“There is nothing of more importance than that the ordinary contracts between man and man, which are so necessary in their intercourse with each other, *should be certain and fixed*, and that it should certainly be known when a man is bound and when he is not. There is a difficulty to comprehend how the essentials of a contract should be different in equity and at law. It is one thing to say that time is so essential that in no case in which the day has been by any means suffered to lapse the court would relieve against it and decree performance. The conduct of the parties, inevitable accident, et cetera, might induce the court to relieve; but it is a different thing to say that the appointment of a day is to have no effect at all, and that it is not in the power of the parties to contract that if the agreement is not executed at a particular time they shall be able to rescind it. * * * I want a case to prove that where nothing has been done by the parties this court will hold in a contract of buying and selling a rule that the time is not an essential part of the contract. * * * *If a given default will not do, what length of time will do? An equity arising out of one's own neglect! It is a singular head of equity.*”

Plaintiff has never at any time, showed his willingness or ability to pay the interest due defendants, or to reimburse them for the amount of taxes paid by them; nor during his occupancy of the property did he show a willingness to comply with the other terms of the contract. On the contrary, he failed to perform nearly every condition required of him thereunder.

**PLAINTIFF UTTERLY FAILED TO FULFILL THE CONDITIONS
OF THE CONTRACT REQUIRED OF HIM.**

This contract was made to depend upon the performance of certain conditions, and the making of certain payments, upon the part of plaintiff, and by its terms no right in the property was to vest in him until those conditons were carried out and payments made.

It is an elementary principle of law that one cannot recover under a contract until he has shown that he has performed all of the acts required of him thereunder or has offered to do so. Plaintiff voluntarily assumed the obligations called for by the contract, but before its completion he violated many of its provisions, and finally abandoned the property. He was not only in default in the payment of interest and of taxes, but also in the matter of farming the ranch properly. He deliberately violated his contract in this respect. He was required to farm the premises in a farmerlike manner—to remove dead trees, replant others, etc. He admitted that he did not replant any trees. His testimony is: "I ordered trees for replanting and cancelled the order" (Tr. p. 130). This is an important circumstance, and has, we submit, a very important bearing upon this case. It not only shows a breach by plaintiff of one of the conditions of his contract, but is proof of his intention to give up the

property and of no longer attempting to carry out his contract.

The evidence shows that in July, 1920, plaintiff placed an order with Elmer Brothers Nursery in San Jose for 300 fruit trees to be planted on this property. Subsequently, however, and in the month of October, 1920, *within a few days after moving away with his family to San Francisco, he cancelled this order.* Plaintiff has offered no excuse to the defendants nor to the court for his action in this regard; but it is significant that he did not deny the testimony of Miss Nola, the bookkeeper for the Nursery Company, who stated that at the time plaintiff cancelled the order for trees he gave as his reason therefor that "*he was going to leave town*" (Tr. p. 203). Surely no stronger proof is required to show that this was done in furtherance of his plan to abandon the property and in violation of his contract. His conduct in cancelling the order at the very time he was leaving the property, together with his statement that the reason for doing so was because he was going to leave town, taken in connection with his many defaults, his numerous debts in the vicinity of the property, and his frequent statements to many other people that he did not intend to keep the ranch and that he was going elsewhere where he could better his financial condition, is positive proof that he had absolutely no intention of ever returning or of fulfilling his contract.

**PLAINTIFF HAS SUSTAINED NO DAMAGE BY REASON OF
DEFENDANTS' RE-ENTRY.**

Plaintiff had the exclusive possession and enjoyment of this valuable ranch and the residence and other buildings situated thereon, for a period of one year, upon the payment of but a small portion of the purchase price. He paid no rent, but received the benefits of all of the profits of the ranch; 40% directly for his own use and benefit, and 60% toward the payment of the interest and principal which he owed to defendants. Upon the strength of this contract of purchase, he borrowed money from local banks amounting to the sum of \$3850, which he has never repaid; he contracted large bills for groceries amounting to several hundred dollars, and for furniture and other household necessities, which he has never paid; he purchased farming implements and tools, upon the strength of this contract, amounting to several hundred dollars, for which he never paid, some of which were taken back because of non-payment; he bought feed for his stock amounting to \$279, which he has never paid; he has never paid his workman for labor upon this property, and this debt amounts to \$345.

What damage has plaintiff sustained? If he has suffered any damage at all in connection with his contract, it is purely because of his own conduct, and not because of any acts of these defendants. Defendants have committed no trespasses. It appears from his own testimony, and from that of disinterested witnesses, that he regarded this ranch

as a "white elephant," and that he was dissatisfied with it, and frequently expressed his intention of giving it up, and that he did not intend to put any more funds into it. Had plaintiff been acting in good faith, he would have made every endeavor to have complied with his contract.

"The fact that compliance with his contract would involve greater expense than he anticipated, would not excuse defendant. Parties *sui generis* cannot escape performance of their undertakings because of unforeseen hardship" (*Metzler v. Thye*, 163 Cal. 98).

Plaintiff claimed to be a man of enormous wealth. He described himself as the owner of a vessel of immense tonnage and part owner of four others, and as having on deposit in the English and Russia Bank at Petrograd several thousand pounds sterling, and, finally, as an opium trader. Yet, while occupying this property he became financially involved, incurring debts amounting to several thousand dollars, to meet his every requirement, none of which he has ever paid. It is no wonder that he invited the defendants to occupy the place.

The situation in this case is identical with that which confronted the Supreme Court of the United States in the case of *Hansborough v. Peck*, (*supra*) except that in that case the purchaser attempted to act in good faith, whereas in the case at bar he has not done so. In that case Mr. Justice Nelson said:

"The truth of the case is, that these plaintiffs improvidently entered into a purchase beyond

their means and, doubtless, relied very much upon the rise of the value of the estate, and of the income, to meet the payments and expenditures laid out upon it. Their anticipations failed them, and a heavy debt was the consequence, beyond their ability to meet. Of the \$93,000 purchase money, they have paid only \$10,000. Of interest, some \$28,000. They expended for improvements \$18,000. There still remained due against them \$83,000 purchase money and over \$20,000 interest, at the time the vendor went into possession. The plaintiffs themselves had been in the possession and enjoyment of the premises for a period exceeding that for which the interest on the purchase money had been paid, which, at least, must be regarded as an equivalent for the money thus paid."

The defendants did nothing whatever to interfere with the rights of plaintiff under the contract. They re-entered after plaintiff had defaulted in many serious respects, and after he had announced his intention to cease farming the place. When they re-entered the ranch was in a condition of unpardonable neglect. It was vacant and unattended. Imperative work which should have been done by plaintiff had to be done by the defendants. Plaintiff now seeks to profit pecuniarily by his own default, and this the law does not allow.

Defendants, having in a peaceable manner assumed possession of the property when neglected and abandoned by plaintiff, have a right to retain that possession, as well as the moneys paid by plaintiff on account of the purchase price.

We have heretofore pointed out to this Court the testimony of plaintiff to the effect that when he left this ranch on October 8, 1920, he had no intention of returning to it, or of sending any one to look after it, until the first of February, 1921, and that he had no intention of ever returning to it personally, except on an occasional visit. Until February first, however, according to plaintiff's intention, this valuable property should be left entirely uncared for. Therefore, when on November 30, 1920, plaintiff's workman, Savio, left, the place was totally deserted and abandoned. It was then that defendants realized, in view of plaintiff's many other breaches, and his defaults in the payment of interest and taxes, that he had no intention of performing his obligations to them, and deemed it their right to enter and protect their property.

Plaintiff's intention with respect of the contract is clearly shown by the testimony of the various witnesses who testified that he had stated that he was not going to keep the property, and by the conversation had in the office of defendants' attorney on January 7, 1921. The subject of this conversation, according to plaintiff's testimony, was the notice sent him by defendants. During this conversation he was asked if he would take back the property, and he replied that he would not. Upon that occasion he stated to Mr. Frank King that he did not want the ranch; that he was dissatisfied with it, and he would not take it back if it were given to him (Tr. p. 206).

This occurred *just one month after defendants' re-entry*, and, according to plaintiff's own statements, *three weeks before he intended to send a workman to re-occupy the property in his behalf.*

In view of this evidence, how can plaintiff complain that he has been damaged by defendants' acts? At that time he did not claim that he had sustained any damage by reason of their re-entry. He refused to take back the property and carry out his contract, although by his own statements he had not intended to again re-occupy the property until the first of February. His present action is apparently an after-thought upon his part. Surely his conduct with respect of his contract, throughout its entire existence, does not entitle him to the relief which he now seeks. To require defendants to surrender to plaintiff, after his many breaches and defaults in reference to his contract, that sum of money which constitutes their only means of compensation for the rental and occupancy of their land, and for the interest and taxes due them, to all of which they are entitled by an express provision of the contract, would be to work the gravest injustice upon them.

We respectfully submit that the judgment should be reversed.

Dated, San Francisco,

February 14, 1923.

Respectfully submitted,

EDWIN A. WILCOX,

FRY & JENKINS,

BERT SCHLESINGER,

Attorneys for Plaintiffs in Error.

No. 3956

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

3

CHARLES E. WARREN, and MABEL D. WARREN,
Plaintiffs in Error,

VS.

F. GENN BROMLEY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

ARTHUR H. BARENDT,
Attorney for Defendant in Error.

FILED

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CLERK

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BRIEF FOR DEFENDANT IN ERROR.

The brief to which counsel for defendant in error is called upon to reply consists of: Attacks upon the character of the plaintiff; endeavors to prove an abandonment which was not pleaded; a claim of many breaches of contract by the vendee in an attempt to dispute the fact found by the lower court that "plaintiff had ^{not} failed to perform the contract in any respect but substantially conformed to all its requirements" (Tr. p. 57), and finally a legal argument which attempts to justify the entry by vendors and which overlooks the fact that the first cause of action of the complaint is a count in *indebitatus assumpsit*, and ignores the well established law both as to a vendee's right of recovery

and the measure of damages for wrongful entry by the vendor.

This honorable court is concerned primarily with the facts of the case and the law which contending counsel conceive applicable to the situation disclosed. Counsel will therefore present in this reply brief his views of the evidence under the pleadings and the legal principles and decisions applicable thereto. This will be done on the theory that a certain right of recovery well recognized in courts of justice has arisen in favor of defendant in error, the vendee, as a consequence of the wrongful seizure by plaintiffs in error, the vendors, of the ranch property subject matter of the contract between them.

Throughout this brief Mr. Bromley will be referred to as the plaintiff and the Warrens as the defendants.

Under the heading, "Preliminary Statement" (Op. Brief, page 6), counsel state that in presenting this appeal they will "*rely solely upon the undisputed evidence.*" Counsel cannot intend to mislead the court. The evidence on which they rely is at best conflicting, as the record shows. Another strange statement is that occupancy by the Warrens was "*with his (Bromley's) consent,*" and yet both Mr. Bromley and Mr. Warren agree that Bromley only asked Warren to look after his stock. (Warren's testimony Tr. p. 194, Bromley's testimony Tr. pp. 132-3-4.) Further on in this brief the claim of

“undisputed evidence” will be clearly shown to be erroneous by a recitation of the evidence covering every part on which it is asserted by counsel for the Warrens to be “undisputed.” The testimony will also be quoted in full which flatly contradicts the statement that the Warrens entered with Bromley’s consent and it is almost needless to add that no such claim was pleaded in the answer of defendants, or in the belated notice of their attorney.

ABANDONMENT—NONE PLEADED—NONE PROVED.

Late in the day, that is to say, about five months after their answer was filed and eight and a half months after their attorney had sent the post-seizure letter (Tr. p. 105) stating that possession had been taken by the Warrens owing to Bromley’s “failure to perform many of the terms and conditions” of his contract, counsel for defendants endeavored to introduce evidence of “abandonment” as justification for the re-entry.

When this was attempted and objected to by Mr. Bromley’s counsel the trial judge, Hon. William C. Van Fleet, said:

The COURT. Where is there anything in these pleadings to raise an issue which would enable you to introduce evidence of this character?

Mr. SCHLESINGER. Paragraph 2, denying that he farmed the land in a farmer-like manner. And Paragraph 3, answering Paragraph 4 of the complaint, we say that the plaintiff did not

place in the temporary care of a competent foreman. We admit that we did take possession of the property on December 8, 1920, because he had breached his contract, and all his rights had terminated; we further say that we entered, denying that we entered without legal right. That was an orchard which needs constant care; we certainly have a right to protect our property.

The COURT. You will have a hard time undertaking to breach this contract upon any ground that is not alleged here. (Tr. pp. 113-4.)

Nor did counsel at any time point out in the answer where "abandonment" had been pleaded; but merely reiterated the phrase taken from the belated letter of Attorney Wilcox, dated December 9, 1920, the day *after* re-entry by the Warrens (Tr. p. 105) "owing to your failure to perform many of the terms and conditions on your part, etc.," and the corresponding sentences in the answer of defendants, wherein they attempted to justify their re-entry (Tr. pp. 46 et seq.).

The attempt to introduce this unannounced defense was made when Mr. Bromley was being cross-examined:

(Witness continuing): I know Mr. Wilson very well. He keeps a general merchandise store at Cupertino. Around about October 1, 1920, it was quite possible I had a conversation with him. * * * The first part of the conversation, I think you are correct. I believe I said to Wilson, as well as to several others, that the ranch was not profitable—was not a profitable investment; that I intended to take care of

it to the best of my ability; and carry out my contract to the letter; but I must combine it with my other business pursuits. (Tr. p 112.)

Following this the witness was asked as to a conversation with Mr. Spencer of the Co-Operative Canneries and the record is as follows:

It is quite possible that I had a conversation with him at the office of the Co-Operative Canneries in the month of October, 1920, concerning this ranch. I did not in that conversation state in substance that I had quit the place and had to give it up. (Tr. p. 113.)

Later by several witnesses, and by way of impeaching testimony, counsel for defendants endeavored to show that Bromley had announced his intention to abandon the property. Not one of these witnesses could recall conversations to that effect with Mr. Bromley at any time until January 7, 1921,—a month less one day, *after* the Warrens had re-entered,—and even then as a matter of inference at best. The testimony of all these witnesses is to be found on page 200 and pages 203-4-5-6 of the transcript, and amounts to a statement that Mr. Bromley “intended to leave town”, which he did; but he returned to the ranch several times after the conversations quoted (Tr. p. 124) except the one (Tr. p. 206) with Mr. King a month *after* the re-entry by the Warrens, that is to say, when Mr. Bromley decided to acquiesce in the abandonment and sue for his damages. It would serve no useful purposes to reproduce any of the testimony; nothing in any con-

versation recalled by any witness contradicts the frequent statement of Mr. Bromley that he intended "to carry out his contract", as already quoted.

When counsel claim the abandonment occurred is a matter of conjecture. In their brief they contend first that the ranch was left unprotected from November 30th to December 8th, and so the Warrens re-entered and yet on page 63 of their brief they cite the conversation with King on January 7, 1921, as evidence of abandonment.

Mr. Warren himself made no claim that Bromley ever said he was going to give up the ranch. Mr. Warren testified that on November 30, 1920 (eight days before the re-entry), Mr. Bromley asked him to "feed the cows and the horses and chickens and to take the milk and eggs." (Tr. p. 171.)

(Witness continuing:) When I saw Mr. Bromley on November 30th I did not agree to look after his stock. I did not agree to take care of the three horses and one cow during his absence, but I did take care of them. I fed the chickens, and also the two dogs. He had not asked me to do that. He never spoke to me about the dogs. He asked me about the stock. I told him I had all the work I could possibly do.

Mr. BARENDT. Q. You don't remember an answer you gave in answer to that question this morning, and yet you are relating to a conversation with Mr. Bromley that occurred on December 30, 1920?

A. When he asked me to take care of the stock I told him I had all the work I could possibly do, and I did not care to take care of the stock.

Q. Is that the same answer you gave this morning?

A. I think so. (Tr. p. 194.)

Mr. Bromley's version of this conversation was as follows:

Mr. SCHLESINGER. Q. In the month of November, 1920, did you have a conversation with both Mrs. and Mr. Warren, in the city of San Jose, at their home in Cupertino, you being present in which you said in substance and effect that you had no money to pay the balance of unpaid interest due on December 1, 1920, or to care for the property; that you were going to discharge your man because you could not pay his wages, and you owed him a large sum of money, and that you would not do anything on the farm until February; if defendants wanted the ranch cared for, they must do it themselves,—or words to that effect?

A. Yes. This probably transpired at the same time,—that I was owing my man his wages; that I could not pay him, he would be paid later on; he was leaving me to find work. I also told them that all the work necessary to be done was finished up to the end of November, or would be, and that I had started my business in the city as a means of obtaining sufficient income to keep myself, **and also provide funds for the overhead of that orchard**, which was,—I believe I used the expression to Mr. Warren,—that it was a “white elephant”. I used that expression to other people as well. I also told Mr. Warren that **I would be running up and down frequently to see that the work on the ranch was properly carried on**, and I think I mentioned at the same time, that I should probably ask Mr. Warren to look after my stock during the time I was looking for a new foreman, and I again repeated that on the 30th day of November, to

which he agreed. Then I think there was some other conversation which took place at that time, which you have not mentioned; Mr. Warren got very heated, and one thing and another—

The COURT (Int'g.). State what it was.

A. I cannot recollect, but I think it was at that conversation that I mentioned that it was rather hard lines that we had parted with our crops and had done our work, but were not obtaining payments for the fruit. Warren said: "We are all in the same box; we have simply to put our shoulders to the wheel and pull through the best we can." I think that was at the same time. * * *

Q. You recollect that you did ask them to look after the stock and not the ranch?

A. Exactly. (Tr. pp. 132-3-4.)

The testimony of plaintiff Bromley and defendant Warren agrees that the request was made by the former that the latter care for his stock and Mr. Warren did *not* claim that Bromley said he was going to abandon the place.

Under cross examination by Mr. Schlesinger, Mr. Bromley testified as follows:

Q. Did you tell him (Warren) in the middle of November, 1920, you and he being present, that you had no money, that you were discharging the man and quitting the place, or words to that effect?

A. Certainly not quitting the place. I had no intention of doing such a thing. (Tr. p. 108.)

Finally, on this topic of abandonment, I quote from Mr. Bromley's testimony showing what he left in the house on the ranch when he went to San Francisco to take up other business pursuits. The

leaving of these things is more potent evidence of intent to return than any statement:

I had sufficient down there; I could take my wife and little girl down there; bed, sheets, blankets, a chair, wash-stand; that is all, I think, in the bedroom. I left cooking utensils, cook-stove, ice-chest, plates and cups and saucers, knives and forks, and sufficient crockery to eat with. I left lots of personal clothing of my own and my wife's, my military uniform. I have not a list of how many shirts and pajamas, and under-vests, but there is quite a quantity of it. My military uniform, and my military kit is there, my working clothes for the labor, my boots, plenty of them, cover-alls. Some of my wife's clothes were left there, dresses, millinery, underwear and her riding clothes. (Tr. p. 122.)

In the face of this uncontradicted testimony and their clients' admissions (Tr. pp. 181-2) of the many personal and household effects in addition to the stock that he found on the ranch, counsel for the Warrens say, on page 8 of their opening brief:

*** * * He abandoned the property and moved with his family to San Francisco taking with him all of his household furniture.**

Nor is this the only glaring misstatement of fact made by counsel. Mr. Warren has just been quoted as having a conversation with Bromley "at their home in Cupertino", that is on the property adjoining the Bromley ranch, on November 30, 1920, eight days before the Warrens wrongfully entered, and yet counsel say:

We have heretofore pointed out to this court the testimony of plaintiff to the effect that when he left

the ranch on October 8, 1920, he had no intention of returning to it until the 1st of February.

This must be some of the "undisputed evidence" on which counsel claim to rely. Yet they are contradicted out of the mouth of their own client, Mr. Warren, and over and over again by Mr. Bromley. Mr. Bromley's foreman, Savio, worked on the ranch until November 30, 1920 (Tr. p. 107) and only for eight days when "there was nothing more to do", when the ranch "had been cleaned up" (Tr. p. 125), was no one working there, though the hired man was still on the place until after the Warrens seized it. (Tr. p. 104.)

NO DEMAND BY DEFENDANTS PRIOR TO RE-ENTRY.

The answer of defendants fails to allege any demand prior to entry. It merely denies wrongful entry and asserts that re-entry was justified "for the reason that plaintiff had breached said contract as in this answer alleged." (Tr. p. 46.)

The re-entry was made on December 8, 1920, in the absence of Bromley, who testified:

The first intimation I had of Mr. Warren's living in the house came from my foreman in the shape of a letter, asking me if I knew that Mr. Warren was living in the house. It was early in December; my old foreman was still living on the place; his furniture was still there; he had a cottage; he had accommodations there; he wrote me inquiring was I aware that the Warrens were living in my house.

Q. Subsequent to that did you receive any written communication?

A. None whatever. I had no communication with the Warrens after arranging with the Warrens that they should feed my stock.

Q. Did you have any communication with Mr. Warren's attorney subsequent to that?

A. No; that came in after the letter from my foreman. (Tr. pp. 103-4.)

In the letter dated December 9, 1920, the Warrens' attorney (Mr. Wilcox) notified Bromley that his clients,

* * * have requested me to notify you that owing to your failure to perform many of the terms and conditions on your part to be performed * * * they have elected to terminate the agreement and have taken possession of the property, etc. (Tr. p. 105.)

Charles Warren admitted he re-entered without demand:

When I went into the house there was a rug folded up, laying in the middle of the floor, and a baby buggy. I occupied the house and am occupying it now. I simply moved over.

Q. You went into this house and took possession and never said a word to Mr. Bromley about it?

A. No sir. (Tr. pp. 193-4.)

* * * * *

I have not heard from Mr. Bromley, either in writing or talked with him personally since the 8th of December, 1920. (Tr. p. 179.)

During the whole year December 1919 to December 1920 the Warrens occupied the adjoining property. (Cross-examination of Mr. Bromley by Mr. Schlesinger):

Q. Don't you know that the Warrens were not living there, that they lived on the adjoining property?

A. They had the adjoining property. (Tr. p. 108.)

(Testimony of Mr. Warren.) In 1920 I lived next door to this property, on the adjoining piece of property. I had occasion to inspect that ranch in the year 1920. (Tr. p. 175.)

Never a word of complaint did the Warrens make in reference to the alleged failure of Mr. Bromley to farm the place "in a first class farmer-like and orchardist-like manner." Mr. Warren said he "went on Browley's ranch perhaps once a week" (Tr. p. 188), but he failed at any time to mention even one of the omissions to perform upon which he based his right to re-enter and take possession of the property. Mr. Bromley in answer to his counsel's categorical questions, said:

At no time between December 1st, 1919, and December 8th, 1920, did Mr. or Mrs. Warren ever tell me I was not cultivating properly or that I was not irrigating properly or that I was not pruning properly. (Tr. p. 98.)

Mr. Warren knew Mr. Bromley was new to orcharding:

Q. You knew he was a man of no experience?

A. I was directing him. (Tr. p. 195.)

The answer of defendants does not allege any demand either for interest or for anything else and no testimony was offered in support of any demand whatever, either prior to or subsequent to re-entry by the Warrens. *After* the re-entry the Warrens,

through their attorney, merely announced that they had terminated the contract; had taken possession of the property and personalty thereon owing to Mr. Bromley's "failure to perform many of the terms and conditions of the agreement."

The COURT. Very cleary, *under this contract*, in order to put plaintiff in default for interest or principal, such as to justify the defendants in undertaking to set aside the contract, it must appear that he was put in default by a demand showing specifically what their claim was, as to his failure to perform the contract. (Tr. p. 163.)

BROMLEY'S ALLEGED FAILURE TO PERFORM HIS CONTRACT.

There remains but one question of fact to be considered—the only one as to which issue was joined in the first count. Plaintiff alleged performance and defendants denied specifically, stating the particulars in which they alleged he had failed to perform.

The failures alleged were: (a) failure to pay interest; (b) failure to pay taxes; (c) failure either to irrigate properly, to prune properly, to eradicate rodents or to spray trees, etc.

The first two of these allegations are questions of law involving interpretation of the contract; the third is a question of fact.

One of the cardinal rules of interpretation of contracts is that a contract must be considered as a

whole—all its provisions must, if possible, be reconciled so that the true intent of the parties may be ascertained. It must be taken by the four corners. If that be done in the case at bar the conclusion cannot but be reached that the proponents recognized the uncertainties attendant upon the raising of fruit crops, their prices and quantities. They realized that annual payments of interest might not be made at the end of each twelve months and so provided that “if not paid as it becomes due it shall be added to the principal and become a part thereof and thereafter bear interest at the same rate” (Paragraph No. 3, Tr. p. 13), and so too with “any of the assessments, insurance premiums, liens or encumbrances on or affecting said property when due.” (Paragraph No. 5, Tr. pp. 16 and 17.) Now bearing in mind the fact that the gross yield of this ranch was \$19,700 (Tr. pp. 152 and 195) in 1919; but \$6000 gross in 1917, and that for 1921 the Warrens expected “a gross yield” in the neighborhood of \$7500 (Tr. p. 193), it is evident what a vast difference in price and productiveness existed. When Bromley had the ranch prices were very low (Tr. p. 155), other ranches suffered “a wonderful loss” and the net was about \$4000 with the final returns not all in as late as January, 1922. (Tr. p. 117.) The Warrens received \$6000 cash when the contract was signed December 1, 1919 (Tr. p. 2) and about \$2064 (Tr. p. 44) for grapes and advance payments from the two fruit companies and they re-entered December 8, 1920.

In interpreting the contract I cannot do better than quote the words of the learned judge of the District Court. He had occasion to consider the contract on the demurrer (Tr. p. 37) to the complaint and to pass upon and quote from it repeatedly during the trial. After denying the defendants' motion for a non-suit and while the defense was putting in its evidence, the court said:

The contract reads: "The balance of said purchase price, to wit, the sum of \$45,000, shall be paid in lawful money of the United States of America on or before five years from this date, together with interest thereon from date until paid at the rate of six per cent per annum, payable annually, and if not paid as it becomes due, it shall be added to the principal, become a part thereof and thereafter bear interest at the same rate." That is the provision which controls the rights of the parties under the contract as to interest. If the annual interest is not all compensated in the way the contract provided, plaintiff would have had a right to pay it out of his own pocket; if it is not paid, the contract provides it shall become a part of the principal and bear interest. *It is one of those contracts that is made in view of the exigencies and uncertainties that arise out of agricultural pursuits.* The contract provides that the entire balance of \$45,000 shall be paid within five years, but then it provides, and that was for the sellers' security, that annually 60 per cent of the crop shall be allocated to him, and he out of that should first apply it to interest, and then on the principal, but the purchaser is given a leeway of five years in which to be able to make the price of the property. (Tr. pp. 185-6.)

That this is the correct interpretation of the contract both as to the manner of payment of principal

and interest there can be no question. The allocation of the sixty per cent was made according to the contract. For the grapes, which were sold for cash, Mr. Bromley accounted immediately to Mr. Warren.

* * * When I sold my grapes I shared them with Mr. Warren according to the stipulated amounts. He took sixty per cent. * * *

Whatever moneys I got prior to December 8, 1920, the proceeds were paid direct to Mr. Warren. In the matter of the grapes I got cash and paid him and he receipted for it. (Tr. p. 101.)

The answer admits the receipt of \$288.69, in two items for grapes (Tr. p. 44), and payments on the crops as allocated and delivered to the two fruit companies named in both complaint and answer. (Tr. id.)

The complaint alleges that the crops, except grapes, were delivered to the California Prune & Apricot Growers, Inc., and the California Co-Operative Canneries with the knowledge and consent of defendants, and "at the express request and order of plaintiff, defendants were credited with 60% of the crop. (Tr. p. 5.) No attempt was made to contradict Mr. Bromley's testimony (Tr. p. 101) in support of this allegation and Mr. Ralph Spencer, a witness for the defense, stated that Mr. Bromley had instructed him to allocate a part of the returns of the fruit to Mr. Warren. (Tr. pp. 200 and 202.) Mr. Warren admitted having received money from both companies (Tr. p. 186); made no attempt to deny that Bromley had done as he swore in his complaint and testified on the witness stand.

The accounts of neither company for the 1920 crop were closed on December 8, 1920, and the payments made to Bromley and Warren up to that time were "advances" (Tr. p. 200) on prospective crop returns. The final account of the Co-Operative Canneries "was issued on August 3 (1921)" (Tr. p. 201) and received by Bromley in October, 1921 (Tr. p. 117) and when Mr. Bromley in January, 1922, was on the witness stand he testified that the Prune Growers' Association had not even then made their final returns for the crop of 1920. (Tr. p. 117.) It is therefore evident that on December 8, 1920, the value of the 60% of the crop was not known, for the crops had not been sold and the *proceeds* could not "be disposed of in the manner provided for in the contract." (Tr. p. 14.) But, whether the returns would or would not have been sufficient to pay a year's interest and something more on account of the principal, the allocation had been made, the title to the 60% had passed to the Warrens. In other words, the *manner of payment* had been complied with, the *amount of payment* could not be apportioned either to principal or interest until *all* the proceeds of the year's crops had been accounted for.

The answer admits that the money as received by the Warrens was credited to interest (Tr. p. 44) and there was more money to come from the same sources, i. e. the two companies. (Tr. p. 141.)

In like manner the taxes if not paid by the vendee could be and actually were paid by the vendors. (Op. Brief, p. 25.) The contract in paragraph 15

(Tr. p. 16) provides that in the event of the second party failing "to pay any of the assessments, insurance premiums, liens or encumbrances affecting said property when due, the parties of the first part retain the privilege of paying the same and upon doing so, said amount or amounts so paid shall thereupon become a part of the principal and shall bear a like interest and be immediately due and payable." And paragraph 13 contemplates and recites that "upon the payment of said principal sum together with all interest, taxes and obligations herein mentioned, etc.", the parties of the first part will execute and deliver to the party of the second part a grant, bargain and sale deed. Commenting upon these paragraphs, the court said:

The COURT. He is showing how he came to go back there. They have a right to show what the grounds were that they re-entered, within the terms of that notice. They cannot be permitted to show he re-entered because he had not paid interest, or had not paid the purchase price, or re-entered because he had not paid taxes. I am talking about the notice. He cannot at this time put the cause of his going upon this land on any other ground except that stated. (Tr. p. 176.)

The notice referred to by the court was the letter of attorney Wilcox dated December 9, 1920. (Tr. p. 105.)

Nor did Bromley fail either to remove dead trees, to irrigate, to cultivate or to eradicate gophers on his pest-ridden costly property. The court found as a fact that Mr. Bromley "had not failed to per-

form the contract in any respect but substantially conformed to all its requirements." (Tr. p. 57.)

Before presenting any excerpts from the record along these lines it is opportune to remark that the testimony was relevant only to the question of damages; that is to say, in mitigation of the damages claimed. There having been no claim of failure to perform *prior* to re-entry by the Warrens, when the defense endeavored to show this failure counsel for Bromley objected and the court then ruled that the testimony was admissible for the purpose of reducing damages, not to justify re-entry. In the light of this statement I will epitomize the testimony responsive to the issues, specifically joined by the answer, in reply to the complainant's allegations of performance.

Removal of dead trees and replanting.

Mr. Bromley could not remember how many dead trees he removed, but referred to his diary, where he himself had made entries on different dates, showing that he had removed them. (Tr. p. 130.) He did not replant them because in the last week in February, or the first week in March, 1920, he had a consultation on his ranch with Mr. Warren. Mr. Warren admitted having that discussion and he decided that the trees should be left for the year. (Tr. pp. 194-5.)

The occasion of that visit Mr. Warren came right through the orchard discussing general orchard matter. * * * I wanted to work that

land up so when irrigation came my water would saturate the soil * * * my idea was to dig out the old trees and cultivate and encourage the new trees. * * * Mr. Warren said it would be better to take advantage of that year's crop on the old trees and let them stand at least one more year. (Tr. p. 221.)

The witness testified also that Mr. Warren examined the trees. (Tr. p. 223.) In spite of this decision by Mr. Warren, Mr. Bromley tried at the principal nurseries in San Jose to buy new trees and could not get them. (Tr. p. 223.) The testimony shows that young trees for planting should be ordered early in the preceding year for delivery in the following spring, and so, however good Mr. Bromley's intentions were in reference to replanting, he was excused because Mr. Warren decided against it and because new trees were not obtainable, and Mr. Warren had failed to order them in 1919.

PRUNING. Mr. Warren admitted that the pruning for the year 1920 was properly done. It had been done by Okumura, the man he had recommended to Bromley. (Tr. pp. 97-8 and p. 101.) His complaint was and could be only that Bromley did not prune between the 1st of November and the 8th of December, 1920.

WITNESS (continuing). I did not say that Mr. Bromley was not pruning the place properly. It was properly pruned in the season of 1920, but not in the latter part of 1920.

Q. What do you mean, "the latter part of 1920"?

A. You must remember that our seasons are from one year to another; in November and December.

Q. November and December? A. 1920.

Q. That is the only time that you claim the place was not properly pruned by Mr. Bromley?

A. Yes.

Q. That is all, absolutely?

A. Yes. (Tr. p. 190.)

During these two months of the year some orchardists prune; others do not.

Mr. Bromley was told by Mr. Postlethwaite that the trees were very poorly pruned (Tr. p. 151) and there is among orchardists a very considerable difference of opinion in regard to the time of pruning trees.

Q. Is there not a difference of opinion among orchardists in regard to the time of pruning trees?

A. Certainly, a very considerable difference. (Tr. p. 214.)

This latter quotation is an excerpt from the cross-examination of Herbert Pash, one of the witnesses for the defense. Mr. Postlethwaite also referred to the difference in opinion in the matter of pruning trees (Tr. p. 157) and stated that he left his ranch for *three* months during the winter doing nothing at all except trapping gophers once a week or so. (Tr. p. 152.)

IRRIGATION. Bromley testified that he "pumped all day as soon as water was available" (Tr. p. 100); that he prepared his irrigation ditches in advance with a new ditcher "double the size" Warren used (Tr. p. 227); that his pump delivered a thousand gallons a minute (Tr. p. 106); that the whole of the upper part of the orchard was irrigated thoroughly;

the water broke over the banks and partly flooded the lower flat, and by the time he had worked up to that bank there was no water to be drawn out of the creek; "that means I irrigated thoroughly as long as water was available." (Tr. p. 131.)

The testimony of Mr. Bromley as to when he commenced to irrigate and when the water was available, taken from entries in his diaries, is entitled to more credence than the uncertain recollection of the three witnesses for the defense, particularly in view of the fact that these three witnesses do not agree as to when there was water available in the creek. (Tr. pp. 225-6-7-8.)

On page 228 of the transcript Mr. Bromley states that there was not sufficient water available between the 23rd of January and the 16th of March. The pump which he had taken over from Mr. Warren was apparently dilapidated just as were the tractor and the disc which he had bought from that gentleman; the pump was continually breaking down (Tr. pp. 228-9) and yet, Mr. Bromley never lost an opportunity to irrigate, even as late as June 28th (Tr. p. 230), when there was any water to be had, except when Mr. Warren, who was lower down on the creek, asked him to stop so that he, Warren, might get some water.

Mr. Warren testified:

The creek came down in December, then it stopped for about two weeks. Then it came down in January, from then until the end of March it ran on and off. I figure the creek ran

that year, I watched it very closely, for about eight weeks. (Tr. p. 216.)

Mr. Pash differs with Mr. Warren, for he says:

Mr. SCHLESINGER. Q. What time in the spring did it come down again?

A. The latter part of February or the early part of March. That is a thing that was impressed on my mind, for the creek to come down early and dry up, and then come back. (Tr. pp. 211-2.)

Okumura, the Japanese, does not agree with either Mr. Warren or Mr. Pash, for he says unqualifiedly:

From the first of January, February and March there was plenty of water in the creek. (Tr. p. 218.)

The U. S. Department of Agriculture's figures for 1920 (Tr. p. 197) in the Santa Clara Valley show only one tenth of an inch for January, one and four hundredths inches in February, and three and forty-three hundredths inches in March. Mr. Warren flouts these figures (Tr. p. 198); on the other hand, Mr. Bromley's diary entry that the water was available in the creek on March 16th for the first time (Tr. p. 227), seems to be fully corroborated.

PLOWING, DISKING AND SPRAYING. The defendants alleged in their answer that plaintiff did not plow said orchard at all; did not double-disk more than half the orchard and did not spray the pear trees as often as customary or more than half the

apricot trees. (Tr. p. 47.) Not one of these claims did defendants substantiate. Bromley double-disked, deep-furrowed and cultivated the ranch (Tr. p. 98) and the banks were horse-plowed. (Tr. p. 119.) Postlethwaite said Bromley did more disking that was necessary. (Tr. pp. 151 and 152.) The same witness stated that he did not plow at all but disked and cultivated for three years on a very successful orchard. (Tr. p. 147.) It would be waste of time to argue the question of plowing vs. disking. As to spraying, Mr. Bromley gave the dates on which he sprayed (Tr. p. 132) and there is *no* testimony to show whether he sprayed too much or too little.

GOPHERS AND RODENTS. Warren testified that he left one dozen traps on the orchard (Tr. p. 192) and Bromley found that dozen and set "at least" six dozen more. (Tr. p. 223.) Then he had boys hired for two or three weeks shooting squirrels and laying poison, etc., on this gopher-riddled ranch. (Tr. p. 139, pp. 148-9 and p. 224.)

TWO MONTHS OF NEGLECT (?) Counsel make the claim that "this valuable property had been deserted since November 30th" (Op. Brief, p. 19), and so to rescue the ranch with its three dozen gopher traps, its dead, dying and gopher-girdled trees (Tr. p. 148), its walnut trees set in ground as hard as cement (Tr. p. 106 and p. 155) and unprotected from insects (Tr. p. 143), all its crops garnered and the entire place cleaned up (Tr. p. 125), they had to rush in unannounced! In counsel's brief,

page 19, this note of alarm is struck and (unintentionally I admit) the error is made of giving December 8, 1920, as the day when the Warrens notified Bromley that "they had elected to terminate the contract." The fact is the letter of their attorney was dated December 9th, and was mailed the day *after* the Warrens had re-entered. Bromley's foreman, Savio, wrote him that Mr. Warren was living in the house (Tr. p. 104), and later he received attorney Wilcox' letter. (Tr. p. 105.)

The fact is that there was nothing to do on the ranch in the two months. Bromley had cleaned up the place:

* * * I made no arrangements for the care of the ranch; there was nothing whatever to do; no work was necessary to be done on the ranch.

Q. Mr. Bromley do you testify that it was your intention that nobody should farm that place, and look after it between October and February, at which time you intended returning?

A. There was work done after October. There was no work necessary to be done from the 1st of December until the end of January.

Q. What work was done during the month of October, to your knowledge?

A. The ranch was cleaned up and all the scrub burned.

Q. What work was done during the month of November? A. The same.

Q. What work did you expect to do there and have done during December and February?

A. There was nothing to do. (Tr. p. 125.)

Mr. Postlethwaite was cross-examined upon this subject and testified as follows:

Q. Did you ever, in your experience as an orchardist, ever hear of any man leaving a place without himself or foreman, or other man in charge for two months at any period of the year?

A. Yes. I did it myself for three months.

Q. You have done that yourself? A. Yes.

Q. Around San Jose? A. Yes.

Q. Where is this place?

A. On the highway, near Lawrence Station.

Q. Where you had prunes and apricots growing?

A. Yes; during the months of from the middle of October to about January 1st nobody was on that place at all. I went down once a week myself to look for gophers.

Q. Do you say that with a ranch of this kind, with the existing weather conditions, the character of the soil and age of the trees, and the climatic conditions, that it would be prudent and farmer-like for a man to leave the property without anyone in charge for the months of December and January, and not return until February?

A. I consider it was a business-like thing to do.

WITNESS (continuing). There is nothing to be done on the ranch in November and December that cannot be done later, except for the gophers and squirrels; where you cannot get water when you want it. A man can prune during the months of December and January, and he can prune during February and March just as well. (Tr. pp. 152-3.)

The Law of the Case.

I venture respectfully to suggest that counsel have misconceived the theory of this entire case and the law applicable to it.

The first count of the Bromley complaint is *indebitatus assumpsit* and is predicated upon the theory that where a vendor wrongfully breaks his contract the vendee has the option of pursuing any one of three courses. One of these options is to acquiesce in the breach and sue in *assumpsit* for the recovery of moneys expended under the contract. It is this course that Bromley pursued.

In *Glock v. Howard Colony Co.*, 123 Cal, 1, there is a graphic recital of the relative rights of vendor and vendee. On page 10 of that decision, discussing the rights of the vendee, the decision says:

* * * or, finally, treating the vendor's breach as an abandonment, he may himself abandon it, when the contract having thus come to an end he may sue at law to recover what he has paid, in an action for money had and received; for, the contract being at an end, the vendor holds money of the vendee to which he has no right, and to repay which, therefore, the law implies his promise.

The latter course referred to in this excerpt was followed by plaintiff here. He sued in *assumpsit* to recover what he had expended while the contract was in existence. To this he has added a cause of action for conversion of the personal property belonging to him, seized by the vendors at the time of the alleged wrongful breach of the contract and retained by them.

In *Thomas v. Pac. Beach Co.*, 115 Cal., 137, in passing upon the character of the action for the purpose of determining the particular section of the Statute of Limitations applicable to it, the court

after explaining that the action was brought to recover, with interest, the purchase money paid by plaintiff, says on page 141:

Actions of the character of the case at bar have been uniformly treated as actions resting in implied *assumpsit* as for money had and received. (*Joyce v. Shafer*, 97 Cal., 335; *Shively v. Semi-Tropic Land Co.*, 99 Cal. 259.)

The case of *Thomas v. Pac. Beach Co.* (*supra*) has been repeatedly quoted, one of the most recent citations being in *Lemle v. Barry*, 181 Cal. 2-3, where the court, after referring to the case, says:

It was there held that such an action was not an action upon the contract. * * * On the contrary, the action for a breach of contract is one based upon the contract.

One of my learned opponents, Mr. Schlesinger, was counsel for the successful appellant in the case of *Breen v. Roy*, 8 Cal. App. 475, and at page 478 the court says:

The performance of the contract having been prevented by the defendant the action was brought in the form of *indebitatus assumpsit*, and not directly upon the contract. This might be done, as the contract was the basis upon which the cause of action arose, and was admissible in evidence. (Citing *Reynolds v. Jourdan*, 6 Cal. 108.)

A case almost on all fours with that at bar is *Heilig v. Parlin*, 134 Cal., p. 99, where the plaintiff was required on taking possession of the land under an agreement of sale, to make certain payments and, at his own expense, to set out vines or fruit trees.

He entered into possession, paid \$885 on the purchase price and expended \$1455 in improvements. The vendor served a notice in writing after the vendee's default demanding possession of the land, and notified the vendee that the contract was absolutely abandoned and determined because of the failure to make said payment, and the vendor took possession. The court says, page 101:

The matter directly involved in this action is the right to recover money paid on a contract rescinded by the other party to it. The only thing appearing upon the face of the judgment to have been adjudged in the former action is the title of Parlin, the plaintiff therein, to the land in question and his right to have such title quieted, and that judgment was entered upon the default of the defendant, the plaintiff here, which was an equivalent to a disclaimer on his part to any claim or title to said land. In other words, he acquiesced in the rescission of the contract on the part of Parlin, and falls back upon his right resulting from such rescission *to recover the money paid, laid out, and expended while the contract subsisted.*

The cases cited by counsel can be very briefly disposed of. They all proceed on the same theory that a default or defaults on the part of Bromley existed. The facts show that Bromley was *not* in default in any matter whatever but on the contrary performed his contract as the court found he did. For in the oral opinion, reduced to writing and filed September 20, 1922, the court says:

I am not going to review the evidence but after its careful consideration it is sufficient for

me to say that in my view plaintiff had not failed to perform the contract in any respect but substantially conformed to all its requirements; and that he was entirely within his rights in treating the conduct of the defendant as a breach of the contract by the latter and suing to recover the moneys that had been paid by him upon the contract with the value of the personal property taken by the defendant and also the expenditures by him made in undertaking to carry out the contract. (Tr. pp. 56-7.)

There having been no default, the starting point of right of entry in the Warrens was missing and the cases cited by their counsel to show what happens "*on a default by the vendee*" can have no bearing on the case at bar. The case of *Catterlin v. Peterson*, 40 Cal. App. Dec. 261, turns on the sentence "*on a default by the vendee without legal excuse, etc.*"

In the case of *Los Angeles Investment Co. v. Wilson*, 39 Cal. App. Dec. 600, quoted on page 49 of counsel's brief, they italicise on page 50 the very words upon which that case hinges and enunciate a statement of fact that does not exist in the case before this honorable court. The italicised words referred to are:

The vendee *being in default*, the vendor might have held possession, lawfully, without any affirmative action.

In the case of *List v. Moore*, 20 Cal. App. 620, there was no question but that plaintiff, the vendee, was in default,

that he was at all times unable or unwilling to carry out or perform the same on his part, al-

though the defendants were at all times ready and willing to perform the same on their part. (Foot of page 618.)

Recovery was denied *because* of the default. In the case at bar there was *no* default. This the learned judge of the U. S. District Court found “after giving it (the evidence) careful consideration.” (Tr. p. 56.)

Where a vendor simply enters without notice or demand and so puts an end to the contract, the vendee is entitled to acquiesce in that action and recover what he has paid. This law runs through all the decisions. It is only when the vendee resists re-entry and refuses to perform that the vendor is not obliged to refund—both then are standing on the contract.

Counsel quote from the case of *Hansborough v. Peck*, 72 U. S. 497, 18 L. Ed. 522, and fail to see the difference in the situation there disclosed from the case at bar. In the case cited the vendor sued to recover possession, as the case says:

* * * the law will not permit him (the vendee) both to withhold the purchase money and keep possession and enjoy the rents and profits of the estate; nor will it subject the vendor to the return of the purchase money if he is obliged to go into a court of equity *to be restored to the possession*.

The court in that case then states that:

* * * no rule in respect to the contract is better settled than this, that the party who has advanced money or done an act in part per-

formance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done. *Green v. Green*, 9 Cow. 46; *Ketchum v. Evertson*, 13 Johns. 364; *Leonard v. Morgan*, 6 Gray 412; *Haynes v. Hart*, 42 Barb. 58.

In the case at bar Mr. Bromley never stopped short and never refused to proceed. No demand of any kind was ever made of him. No abandonment was pleaded or proved. He did not stop short; he paid in cash 60% of the moneys he received for his grapes and made the allocation of 60% of all the other crops in strict compliance with his contract. Then,—in his absence,—unannounced—the Warrens re-entered. Is it necessary to go further in pointing out the essential differences between this case of *Hansborough v. Peck* and the case at bar?

In their notice mailed subsequent to their re-entry the attorney used words which put an end to and canceled the contract. These words were:

They have elected to terminate the agreement.

The Warrens terminated the contract and Bromley made it mutual by acquiescing in the termination. Then he sued to recover the moneys paid, expended and laid out while the contract subsisted.

Counsel quote from the case of *Schwerin Estate Realty Co. v. Slye*, 173 Cal. 170; but overlook the fact that the plaintiff was *standing squarely on the contract*, not suing in *assumpsit* based on a contract

already at an end. This is clear from the language of the decision and from the fact that whatever rights the defendants claimed, they asserted under the contract:

But respondent as late as March 28, 1913, tendered a deed and offered to put defendants in actual possession of the property upon payment of the balance of the purchase price. If the vendees had desired to consummate the contract or to recover back their deposit they should have made a tender of the balance due and should have demanded performance by the vendor. Not having done this they are not in a position to demand the relief for which they have prayed. (Citing many California cases.) *Schwerin Estate Realty Co. v. Slye*, 173 Cal., 170 at 182.

It has been held over and over again that the clause in a contract permitting a vendor to retain moneys paid by the vendee after the latter's default is a mere declaration of right which exists without the necessity of its being expressed in the contract. This right, however, comes into being only *on default of the vendee*. It may be waived by the vendor. It cannot be successfully asserted by the vendor in the absence of default on the part of the vendee. Whenever the vendor has terminated the contract wrongfully, the vendee, as a matter of absolute right as clearly defined as that of the vendor just mentioned, is entitled, as said in *Glock v. Howard Colony Co.*, and a score of cases sustaining it, to recover what he has paid, expended and laid out while the contract was still in existence—the contract which the vendor has wrongfully breached.

I will not waste time replying to the suggestion "Plaintiff has sustained no damage by reason of defendant's re-entry." (Caption, defendant's brief, page 59.) The measure of damages in cases such as this is tersely stated in *Heilig v. Parlin* (supra) as "the money paid, laid out and expended while the contract existed". The court found in this case that Mr. Bromley had paid \$6000, that the "money expended over and above what he received in the way of returns from crops, etc.," was \$1200, and that the personal property taken over by defendants when they re-entered was worth \$1800.

Counsel make no argument on the count in conversion. Bromley stated in detail the items of personal property left by him on the ranch and gave their value. (Tr. pp. 119-123.) Mr. Warren admitted that the stock was still on the ranch; that he bought for \$1000 (Tr. p. 192); the tractor billed to Bromley at \$1575, and on which \$500 (Tr. p. 120) had been paid and that he used some of the lug boxes, fruit trays, and that sundry other articles were "still there." (Tr. pp. 192-3.)

THE ATTACKS ON MR. BROMLEY'S CHARACTER.

Irrelevant though it may be, if the attacks on Mr. Bromley are passed unnoticed it might be assumed that their truth was admitted. This as a lawyer and in justice to his client, counsel for Mr. Bromley cannot do. The indulgence of this honorable court

is therefore asked, while without harshness or unnecessary burden of verbiage, a reply to these uncalled for attacks is presented.

Counsel's short statement at the top of page 7 of their brief is headed "Statement of Facts". In the four line paragraph it is alleged that at the time plaintiff sought to purchase the property subject matter of the controversy "he represented himself to be a man of great wealth; and able to assume all of the financial obligations of the contract". Even if such were the fact it would nevertheless be irrelevant to any issue in the case, for the defendants (the vendors) nowhere justified their wrongful seizure of the ranch by pleading false or fraudulent or any misrepresentations on the part of Mr. Bromley, the purchaser. Furthermore there is not a line of testimony to show that either of the defendants ever heard of the alleged misrepresentations.

That he did not misrepresent his possessions must be evident from a perusal of the pages of the transcript cited by counsel. (Tr. pp. 231 to 236.) Mr. Bromley testified that in 1914 he made a deposit of several thousand pounds in the Russia & English Bank in Petrograd and that he had a bankbook showing the deposit. Does anyone knowing anything of current world history in Russia between 1914 and 1921, need to be told that probably many thousands besides Bromley have never since heard of their bank accounts in Petrograd or their deposits made there "in the first year of the war"? (Tr. p.

236.) However, it is evident that Mr. Bromley is entitled to no hearing in court because he will in all human possibility never see a ruble of his Russian deposits!

Again, nowhere in his testimony did Mr. Bromley say or claim "to be the owner of one of the largest vessels in the world". (Op. Brief, p. 7.) What he did say was clear and to the point, but like his testimony as to the Russian bank deposit, it prompted no further inquiry on the part of the defense. Mr. Bromley said *inter alia*:

I am the owner of one vessel and part owner of four others. They are in the Pacific, trading down the China Coast and in the Straits Settlements. The boat I own is the "Kango". She plies between Hongkong and Torres Island and was there the last time I heard from her the early part of last year. I cannot tell who her captain is, she is under the control of Hang Mow & Co., my agents in Hongkong. The "Asia" I saw in Hongkong; her tonnage is about 22,000. She is registered in Lloyds under the Chinese flag. She was a British cruiser. I cannot tell you the name of the master. I heard from her last in the spring of last year. She came up from the islands loaded with copra. These vessels are registered, all four of them in the name of the company in the headquarters at Hongkong, in the British Government.

The COURT. How does it come that you received no returns from these investments?

A. They are not making money at the present time, like many other commercial organizations in the Orient.

Q. When did you last receive returns?

A. When I was in Hongkong just before coming to California.

Q. Did you come from Hongkong here?

A. Yes.

(Paraphrase of Testimony, Tr. pp. 232-5.)

Because counsel are unfamiliar with trade conditions in the Orient during the past few years, they ask this honorable court to assume that this testimony is pure fabrication. The field of inquiry was voluntarily thrown open to them; but they declined to follow up their examination of the plaintiff along those lines and closed thus:

Q. You were engaged in the opium trade, were you not?

A. I have been. (Tr. p. 236.)

And yet during the war every nation on each side clamored for opium. Opium is not used only by the heathen Chinese, but by the Caucasian, in paregoric (tincture of opium), in laudanum (lead and opium), in Dovers powders (ipecac and opium), and in morphine and codia, to give the diseased and the wounded surcease from their sufferings!

These charges of misrepresentation and engaging in the opium trade are relevant to no issue, but are made apparently only to injure the name of "Major" Bromley, for that was his rank in the British Army, (thrice) wounded (at Vimy Ridge) then honorably discharged, and who came to California by way of Hongkong (Tr. p. 234) to recuperate his shattered health. (Tr. p. 97.)

No useful purpose would be served by replying in kind to the assault thus made upon the defendant in error; but some of the facts in regard to the prop-

erty sold by the Warrens to this novice in orcharding at the stupendous price of \$51,000, must be presented. These show that this invalided soldier, though evidently imposed upon, stood manfully by his poor bargain until the defendants over-reached themselves by seizing the ranch during his temporary absence!

The year before Bromley bought the ranch from the Warrens, Mr. Warren testified that the crop return was \$19,700 gross (Tr. pp. 152 and 195), and on this figure he sold. In 1917 the same property yielded \$6000 gross and for the year 1921 Warren said he expected "a gross yield in the neighborhood of \$7500."

(By the Court.) Q. So that 1919 was a very exceptional crop?

(Mr. Warren.) A. It was an exceptional year. (Tr. p. 183.)

Mr. Pash, a witness called by the defense, testified on cross-examination:

The returns from my orchard for 1920 compared with the returns for 1919 showed a wonderful loss in 1920 over 1919. (Tr. p. 213.)

Bromley paid his \$6000 down when he bought (admitted by the pleadings and in the testimony), and with the prospect of a \$19,700 crop borrowed money from the Bank of San Jose and the Garden City Bank, and purchased a bean sprayer, a tractor, a cultivator and many other things. On some of these he made partial payments only and he was optimistic in his ignorance. Strange indeed it is, that the persons who complain of Mr. Bromley's debts are,

not his creditors, but the Warrens to whom he paid \$6000 in cash and to whom he owes nothing!

Harry Postlethwaite with over thirty-three years (Tr. pp. 142-3) of fruit ranching and appraising of orchard property behind him, testified to seeing the 51-acre property about a week after Bromley bought it and he said:

Q. What was the general condition of the property at that time in your view, as an experienced orchardist?

A. The orchard and trees were simply in a rotten condition; the place looked as though it had not been cared for, for years.

WITNESS (continuing). I might say the trees were falling to pieces with rot, a great many of the old trees, the trunks were absolutely rotten; once or twice I put my hand right through the trunk, and told Mr. Bromley to shake hands with me; and the young trees that were interset among the old trees, I made the remark they were practically dead, giving the reason that they had not been covered to protect them from insects; the borers got in, and they looked as though they were practically dead; they were so stunted. They were mostly apricots. I saw the walnut trees. I think that most of them were either dead or dying. They were young trees not bearing. (Tr. p. 143.)

The orchard looked to me as though it was simply ridden with gophers and squirrels. The trees must have been "girdled" the season before; there were a number of trees that had been girdled and I showed them to him. On January 7, 1920, I showed him a number of trees that had been girdled, where the gophers had gone around the trunk of the tree, and partially or thoroughly taken the bark off. In

most cases it does kill the tree. I have no idea how many trees had been injured in that way.

* * * A. I think it was the worst place I ever saw for gophers. (Tr. pp. 148-9.)

A. The trees had been very, very poorly pruned for a number of years. * * * I told Mr. Bromley whoever was pruning the trees was doing a very poor job. (Tr. p. 151.)

Q. Did Mr. Bromley state to you on January 7th, that he was dissatisfied with his purchase?

A. No, he was very optimistic. * * * While the fruit was on the trees he was optimistic; he could see tons where I could only see pounds. (Tr. p. 151.)

* * * I know as a matter of fact, that Mr. Bromley was not an orchardist and never farmed in his life before. I understand he was told that he could get enough money out of the crop to practically pay a very large portion of the purchase price. (Tr. p. 154.)

Mr. SCHLESINGER. Q. You did find a large number of dead trees on that ranch on January 7th?

A. Trees that were apparently dead.

WITNESS (continuing). I am not able to estimate the number. Right where there were young trees planted there were some old trees too; a great many apparently dead, and a great many dying. (Tr. pp. 156-7.)

These excerpts from the record are reproduced to show the optimism, enthusiastic work of Mr. Bromley in trying to live up to his contract and at the same time his inexperience in orcharding and the worthlessness of the property he had purchased.

Bromley the novice, "could see tons" of fruit where Postlethwaite, the experienced orchardist, "could only see pounds". As to prices in 1919 "the exceptional year" and 1920, Mr. Bromley's year, Mr. Postlethwaite testified:

Yes, I know the prices very well that were paid for prunes, apricots and peaches in the years 1919 and 1920. The prices in 1919 were considerably higher on prunes, and somewhat higher on apricots and things like that than in 1920. In 1920 the selling price opened at a pretty good high price, but all the canneries lost money, that put down that price, and the co-operative canneries later could not make those high returns. (Tr. p. 155.)

* * * * *

Q. Did you know it in the year preceding the year of Mr. Bromley's agreement to purchase, that that ranch produced nearly \$19,000 in crops?

A. I heard that. I was very much astonished except for one reason.

The COURT. Q. What was the one reason?

A. The year before that, 1919, in September or early in August, there was 6 $\frac{1}{4}$ inches of rain fell in two days; I have a friend who has an orchard very close to the Warren orchard, and I believe if it had not been for that rain that orchard would have died; but they got one of the best crops they ever got, it was caused by that rain. If the Warrens did get that much I think it was caused by the same reason. If sick trees get a little high life they bud and do a little spurt that they are not accustomed to. (Tr. pp. 149-50.)

These extracts from the record show the false light in which the plaintiff is put by the brief of counsel. I have shown that Mr. Bromley, as an invalid, inex-

perienced in orcharding, entered into this contract, labored optimistically and ran into debt. It was only in the fall of the year when poor crops and low prices came that he realized that he had a "white elephant" on his hands and yet he testified:

* * * I intended to take care of it to the best of my ability and carry out my contract to the letter, but I must combine it with my other business pursuits. (Tr. p. 112.)

Neither in his pleadings nor in any of his testimony did Mr. Bromley ever suggest that he had been victimized by the purchase of a worthless property. It has remained for the defense to make charges of misrepresentation—charges that are as untrue as they are irrelevant.

Nothing whatever of law or fact has been advanced by counsel as grounds for reversing or modifying in any manner whatever, the judgment of the Honorable Judge of the U. S. District Court.

Dated, San Francisco,
March 3, 1923.

Respectfully submitted,
ARTHUR H. BARENDT,
Attorney for Defendant in Error.

No. 3956

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES E. WARREN and MABEL D. WARREN,	}
<i>Plaintiffs in Error,</i>	
VS.	
F. GENN BROMLEY,	
<i>Defendant in Error.</i>	

PETITION FOR A REHEARING ON BEHALF OF
PLAINTIFFS IN ERROR.

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and Petitioners.*

FILED

MAY 16 1913

F. D. MORETTI

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PETITION FOR A REHEARING ON BEHALF OF PLAINTIFFS IN ERROR.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

We do not seek to controvert the principles of law announced by the learned Circuit Judge in the opinion filed. No request for general or special findings was made by either side. But the formal submission of this case was made only after the filing of briefs therein; and in the closing brief of the plaintiffs in error a request was made in general terms that judgment be rendered in favor of the

plaintiffs in error. This fact does not appear in the record, however, and it may be that plaintiffs in error cannot on that account take advantage of the request thus made. Hence, we do not feel justified in asking for a rehearing upon that ground.

We confidently submit, however, that notwithstanding the failure to ask the trial court for findings, it is, nevertheless, incumbent upon the Appellate Court to review the rulings of the trial court made during the progress of the trial and appearing in the record.

In the case of *Dunsmuir v. Scott*, 217 Fed. Rep. 200, 202, the Circuit Court of Appeals said in part:

“Under the provisions of Act March 3, 1865, 13 Stat. 501, Rev. St. Secs. 649, 700 (U. S. Comp. St. 1913, Secs. 1587, 1668), the rule is well settled that if a jury trial is waived, and a general finding is made by the court, *review in an appellate court is limited to such rulings of the trial court in the progress of the trial as are presented by a bill of exceptions*, and that the bill of exceptions cannot be used to bring up the oral testimony for review. *Norris v. Jackson*, 9 Wall. 125, 19 L. Ed. 608; *Dirst v. Morris*, 14 Wall. 484, 491, 20 L. Ed. 722; *Grayson v. Lynch*, 163 U. S. 468, 16 Sup. Ct. 1064, 41 L. Ed. 230; *Streeter v. Sanitary District of Chicago*, 133 Fed. 124, 66 C. C. A. 190; *Hill v. Walker*, 167 Fed. 241, 256, 92 C. C. A. 633; *W. L. Perkins & Co. v. Von Baumbach*, 185 Fed. 265, 107 C. C. A. 371; *New York Life Ins. Co. v. Dunlevy*, 214 Fed. 1, 130 C. C. A. 473.
* * *

On page 256 of the transcript of record filed in this case the following is set forth under the heading of assignment of Errors:

"That the Court erred in not holding that the decision of the Superior Court of the State of California for the County of Santa Clara sustaining the demurrer to the complaint for the same cause of action and between the same parties constituted a bar to the action herein."

It appears from the transcript of record, pages 69 to 96, inclusive, that counsel for plaintiffs in error tendered an amendment to the answer in this action in the trial court based upon the following ground and to the following effect: That a complaint practically identical with the complaint in this action, and involving the same transaction, was filed in the Superior Court of Santa Clara County prior to the filing of a complaint in this action (Tr. p. 1 and p. 71). A demurrer thereto was filed setting up the ground that the complaint failed to state facts sufficient to constitute a cause of action (Tr. p. 89). The demurrer was heard and sustained by the court and an order and written opinion was filed based upon the merits of the case (Tr. pp. 93-94).

In support of the requested amendment, counsel for plaintiffs in error proffered to the trial court a certified copy of the complaint (Tr. p. 71), a certified copy of the demurrer (Tr. p. 89), a certified copy of the order sustaining demurrer (Tr. p. 93), and a certified copy of the order and opinion of

the court (Tr. p. 94). Counsel for plaintiffs in error duly excepted to the action of the court (Tr. p. 96) and has assigned error (Assignments, Tr. p. 256).

The matter of the prior action in the Superior Court for the County of Santa Clara and the order of that court sustaining the general demurrer to the complaint in that action is referred to on pages 20 and 21 of the opening brief of plaintiffs in error filed in this honorable court.

We submit that the trial court erred in failing to allow the amendment to the answer requested by counsel for plaintiffs in error. For, according to the authorities, the order of the Superior Court of the State of California for the County of Santa Clara, sustaining a general demurrer to the complaint, filed previously to and being practically identical with the complaint herein and embracing the same transaction and between the same parties, constitutes a bar to this action, it being the decision of a trial upon the merits. This question was fully and fairly presented to the lower court but the court refused leave to amend, holding that an alien may resort to either the State or Federal tribunal and could dismiss his case in the State court after demurrer and decision and proceed anew in the Federal court (Tr. p. 95).

When a party files an action in a State court and thereby elects his tribunal and submits to its jurisdiction, he may not thereafter prosecute an identical action in the

Federal court when such action in the State court either (1) has reached a determination, or (2) remains open for mere formal entry of judgment after decision.

The defendant in error by an attempted dismissal after a demurrer in the Superior Court had been sustained could not have invoked the jurisdiction of the Federal courts.

Section 581 of the Code of Civil Procedure of the State of California provides as follows:

“An action may be dismissed, or a judgment of non-suit entered, in the following cases:
1. By the plaintiff himself, by written request to the clerk, filed among the papers in the case, at any time before trial, upon payment of costs; provided a counterclaim has not been made, or affirmative relief sought by the cross-complaint or answer of the defendant.”

In *Goldtree v. Spreckels*, 135 Cal. 666 (uniformly followed) the Supreme Court of this State has definitely held that the term “trial”, within the meaning of section 581, subdivision 1, of the Code of Civil Procedure, and otherwise, includes the hearing of a general demurrer, and that

“When a general demurrer to a petition is sustained, and the plaintiff declines to amend, he practically confesses that he has alleged in his pleading every fact he is prepared to prove in support of his action. Therefore, in such a case, nothing remains to be done except to render judgment for the defendant.”

The court in that case said, among other things:

“The Code of Civil Procedure declares that issues arise on the pleadings, and are of two

kinds,—namely, of law and of fact. (*Code Civ. Proc.*, sec. 588.) ‘An issue of law must be tried by the court, unless it is referred by consent.’ (*Code Civ. Proc.*, sec. 591.)

In *Tregambo v. Comanche etc. Mining Co.*, 57 Cal. 501, the court said: ‘A trial is the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause for the purpose of determining such issue. When the court hears and determines any issue of fact or of law, for the purpose of determining the rights of the parties, *it may be considered a trial.*’ In that case the issue presented was on the application to set aside the default entered against the defendant and allow it to answer, and this motion was made before the trial on the merits. The point decided was that it was a ‘trial’ within the meaning of the word as used in section 650 of the Code of Civil Procedure.

So it was held in *Finn v. Spagnoli*, 67 Cal. 330,—that the hearing and *disposition of a motion for a new trial is a trial.*

A statute of the United States providing for the removal of causes required the filing of the petition to be ‘at or before the term at which said cause could be first tried, and before the trial thereof’. What was meant by the term ‘trial’, used in this statute, was decided in *Alley v. Nott*, 111 U. S. 472, opinion by Chief Justice Waite. The suit was begun in the supreme court of New York. Demurrers to the complaint were interposed on the ground ‘that it did not state facts sufficient to constitute a cause of action’. The issues of law raised by the demurrers were brought to trial, and the court overruled the demurrers, with leave to defendants to amend, and in default of doing so judgment was to be entered for plaintiffs. Notice of appeal was served, and stay of execution on the interlocutory judg-

ment was moved, and further time to answer given. Finally, the appeals were withdrawn, and also the demurrers, answers filed, and a petition was filed for the removal of the suit to the circuit court of the United States for the southern district of New York. The circuit court, on motion, made an order remanding the cause, and the appeal to the United States supreme court was from this order, where it was held that the petition was not in time. Various sections of the New York Code of Civil Procedure are cited,—as to what are issues, how an issue of law arises, that upon a decision of a demurrer the court may, in its discretion, allow the party in fault to plead anew or amend, that an issue of law must be tried by the court, that after joinder of issue either party may serve a notice for a trial,—all of which are similar to the provisions of our code. The learned chief justice then says: ‘A demurrer to a complaint that it does not state facts sufficient to constitute a cause of action, is equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finally dispose of the case as stated in the complaint on its merits, unless leave to amend or plead over is granted. The trial of such an issue is the trial of the cause as a cause, and not the settlement of a mere matter of form in proceeding. There can be no other trial except at the discretion of the court, and if final judgment is entered on the demurrer, it will be a final determination of the rights of the parties, which can be pleaded in bar to any other suit for the same cause of action. Under such circumstances, *the trial of an issue raised by a demurrer which involves the merits of the action is, in our opinion, a trial of the action within the meaning of the act of March 3, 1875.*’ *The language of the act is ‘at or before the term at which said cause*

*could be first tried, and before the trial thereof'. The language of our code is 'at any time before trial'. There is no perceivable difference between the two acts. We cannot see why it is not true, as was said in Tregambo v. Comanche etc. Mining Co., 57 Cal. 501, that 'when a court hears and determines any issue of * * * law for the purpose of determining the rights of the parties, it may be considered a trial'; and a general demurrer, challenging the sufficiency of the facts, goes directly to the determination of the rights of the parties and all rights involved in the complaint.*

* * * * *

Under a code provision the same as that in the Ohio code the question came before the Nebraska supreme court in *State v. Scott*, 22 Neb. 628. A general demurrer had been argued and submitted in the lower court on July 6, 1887, and a decision agreed upon, the docket entry being 'July 6, writ denied'. The court thereupon adjourned until September 20, 1887. On September 2, 1887, the relators attempted to dismiss the action by filing a voluntary dismissal the attorney-general objected and asked that the attempt to dismiss be disregarded, and that judgment be rendered. The court cited *Beaumont v. Herrick*, 24 Ohio St. 446, stating that the Nebraska and Ohio codes were identical, and quoted the paragraph found above. Other cases were also cited to the same effect, the court continuing: '*No case has been cited where under a statute like ours a plaintiff as a matter of right can dismiss his action after it has been submitted to the court. If he could do so, litigation would become interminable, because a party who was led to suppose a decision would be adverse to him could prevent such decision and begin anew, thus subjecting the defendant to annoying and continuous litigation. The statute, therefore, limits the right*

of the plaintiff to dismiss to the final submission of the case. In the case under consideration the relators had set forth all the facts upon which they relied for the writ, and the case was finally submitted to the court, which determined that the facts were not sufficient to entitle relators to the relief prayed for. *The motion to dismiss, therefore, was unavailing, and the judgment rendered July 6th denying the writ will now be entered of record.*' The demurrer was then considered and sustained. The same view is expressed in *Scherff v. Missouri Pacific Ry. Co.*, 81 Tex. 471. The court said: 'When a general demurrer to a petition is sustained, and the plaintiff *declines* to amend, he practically confesses that he has alleged in his pleading every fact he is prepared to prove in support of his action. Therefore, in such a case, nothing remains to be done except to render judgment for the defendant. Since the defendant by his demurrer has admitted all the facts of the plaintiff's case, we see no reason why the judgment should not be regarded as a conclusive determination of the litigation on its merits. So, also, if the plaintiff takes leave to amend, but fails to do so, and judgment is rendered against him for that reason, it is as if he had declined to amend in the first instance.' "

We quote the following from the case of *Wolf v. District Court*, 235 Fed. 69, 73 (C. C. A.):

"It appears that the Supreme Court of the State of California has not yet acted upon an appeal in case No. 50811 taken from the judgment of the lower state tribunals, and inasmuch as that court will apparently be called upon to decide the issues tried in the action to quiet title, it is clear to us, that the federal court ought, at least at this time, to decline to pro-

ceed with the case before it. By proceeding in the federal court a judgment might be rendered which would be in conflict with the one rendered by the state court, and create that confusion deprecated by the Supreme Court, where attempts have been made to transfer matters standing for judgment in the one court to the other.”

We quote the following from the case of *Robinson v. Wemmer*, 253 Fed. 790, 794 (C. C. A.):

“It appeals to this court that complainant, having already submitted to the jurisdiction of the state court through his answers, is no longer in position to press this complaint, whether or not he might have done so originally; nor do we regard the allegation that the venue of the state court is hostile to him as one which would tend to confer jurisdiction upon this court. If he is entitled to any protection from such assumed hostility, he must press for it before some state tribunal.”

We submit that the defendant in error in the instant case, by filing his suit in the Superior Court for the County of Santa Clara, and by allowing that suit to proceed to the point of the decision of a trial upon the merits (i. e., the hearing of the general demurrer), thereby submitted as fully, if not more fully to the jurisdiction of the State court, than did the complainant in the case of *Robinson v. Wemmer* (supra), by the mere act of filing answers.

In the pertinent case of *Hyatt v. Challiss*, 55 Fed. 267 (C. C.), the court said:

“This is an action of ejectment. The action was originally brought in the district court

for the county of Atchison, and a trial upon the merits was had in that court. On the 28th day of January, 1888, a judgment was rendered in favor of the defendant Challiss. Thereupon the plaintiff and certain other defendants (under the statute of Kansas) caused a notice to be entered on the journal that they applied for an order setting aside and vacating the said judgment, and granting another trial of the case. The statute under which these proceedings were had is in the following language:

‘In an action for the recovery of real property, the party against whom judgment is rendered may, at any time during the term at which the judgment is rendered, demand another trial by notice on the journal, and thereupon the judgment shall be vacated, and the action shall stand for trial at the next term.’
Section 4702, *Gen. St. Kan.*

Section 4703 provides:

‘No further trial shall be had in such action, unless for good cause shown a new trial be granted, or the judgment reversed, as in other actions.’

After obtaining the new trial upon demand, as provided by the statute, the cause was continued until the next term of the court, and upon being called for trial at the next term, to wit, on the 9th day of September, 1889, the plaintiff declined to proceed to trial, but dismissed his action, and thereafter, on December 3, 1890, brought his action in this court. These proceedings were all made to appear by the answer of the defendant Challis in this action, a transcript of the proceedings in the state court being incorporated therein, and upon the pleadings he asks for judgment.

The state district court for Atchison county had jurisdiction of the cause. One trial was had in that court; a new trial granted, not for

error, but as of right, under a statute giving a second trial upon demand; and the question now to be settled is whether, after these proceedings had in the state court, the plaintiff can dismiss his action there when the case is called for trial a second time, and then bring his case in the federal court. This, I think, the plaintiff cannot do. *If he wished to have his case tried in the federal court, he should have brought it there in the first instance. This he had the unquestioned right to do; but he selected his tribunal, and sought to litigate his rights in the state court, and had one trial in that court, which resulted in judgment against him.* He then demanded a new trial in that court under the statute, which was granted, and procured the judgment entered against him on the first trial to be set aside. If the first judgment had not been set aside under the statute, it would have been final. By procuring that judgment to be set aside, without cost, under the statute, which was a part of the proceedings authorized, plaintiff waived his right to resort to this tribunal."

In refusing leave to amend the answer, Hon. Wm. C. Van Fleet said (Tr. pp. 95, 65):

"An alien may have the right to resort to either one of two tribunals. He has a right to go into the state court. He, like any other suitor, has his right to dismiss at any time; he may for reasons best known to himself, dismiss; that does not preclude him of the right to proceed in any tribunal that is open to him. If you have anything that runs counter to that, I would like to hear it.

There is no doubt about the principle that if one seeks to have his rights determined in one tribunal, and there is a definitive and binding judgment in the case, he cannot go to an-

other tribunal and be heard on the same matter. He has had his day in court. But these principles have application only in the character of instances I have indicated. It must be a final determination upon the merits. *It is true the final determination of the merits may be had upon demurrer.*

* * * * *

If this is to be pleaded as *res adjudicata*, I do not think the statement made brings it within the doctrine of *res adjudicata*. *A demurrer had been sustained, and the parties given a right to amend."*

It thus appears that the Honorable Judge of the trial court based his decision on the theory that the defendant in error had the right to dismiss his case in the State court after decision against him and to commence anew in the Federal court.

We beg leave to submit, however, that any dismissal of the action in the State court, entered ~~by~~ *the clerk* upon the request of the defendant in error subsequent to the sustaining of the demurrer, was a nullity and, therefore, this action in the State court still remains open (Section 581, *C. C. P.*; *Goldtree v. Spreckels*, 135 Cal. at p. 666).

The demurrer in the Superior Court action (Tr. p. 89) is based in part upon the ground that the complaint failed to state facts sufficient to constitute a cause of action; and the opinion of the Judge of the Superior Court in sustaining that demurrer (Tr. p. 94) clearly shows that his decision was based upon the failure of the complaint to state facts sufficient to constitute a cause of action. He

held that the defendant in error was in default with respect to an important obligation resting upon him and therefore could not maintain the action. In this connection the Judge of the Superior Court of Santa Clara County in his decision stated:

“The interest was to be paid independently of the non sale of the security. Hence on the face of the pleadings plaintiff was in default of the payment of \$819.72 in interest on December 1st, 1920. Demurrer sustained” (Tr. p. 95).

We respectfully submit that the order sustaining the demurrer of the Superior Court was a final determination of the action, in view of the fact that plaintiff (defendant in error) failed to amend his complaint or to take any other action toward an appeal—such as having a formal judgment entered. He did not avail himself of the right to amend his complaint, and thereby admitted that the demurrer was well taken. He elected to accept that decision. He submitted himself to the jurisdiction of that court and is bound by its decision. *He invoked that jurisdiction* and sought to escape it only after an *adverse decision*. The District Court was without jurisdiction in the case because of the prior decision of the State court and that prior decision was called to the attention of the Federal court (there being no dispute as to the authenticity of the papers or as to the facts therein set out).

In view of the foregoing we respectfully urge that the plaintiffs in error be given a rehearing.

(All italics and capitals ours.)

Dated, San Francisco,

May 16, 1923.

Respectfully submitted,

EDWIN A. WILCOX,

FRY & JENKINS,

BERT SCHLESINGER,

*Attorneys for Plaintiffs in Error
and Petitioners.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiffs in error and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,

May 16, 1923.

BERT SCHLESINGER,

*Of Counsel for Plaintiffs in Error
and Petitioners.*

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE E. MILLER,

Plaintiff in Error,

vs.

SPOKANE INTERNATIONAL RAILWAY COM-
PANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Eastern District of Washington,
Northern Division.

FILED

APR 20 1923

U. S. DISTRICT COURT

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE E. MILLER,

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vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Error. [1*]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COM-
PANY, a Corporation,

Defendant.

Complaint.

Plaintiff complains and alleges:

I.

That the Spokane International Railway Com-
pany, the above-named defendant, is now and was
at all times herein mentioned a corporation, created,

*Page-number appearing at foot of page of original certified Trans-
cript of Record.

organized and existing under and by virtue of the laws of the State of Washington, owning, operating and controlling an interstate line of railway within and between the States of Idaho and Washington, and engaged in interstate commerce as a common carrier.

II.

That at the time of the happening of the accident to plaintiff, hereinafter mentioned, he was in the employ of defendant as an engineer on one of its trains, being operated over its line of interstate railway, and hauling and transporting interstate freight and freight which had originated in whole or in part in the Dominion of Canada, and whose destination was some point in the United States.

III.

That immediately prior to the time of the happening of the accident to plaintiff, hereinafter mentioned, plaintiff, in the operation of said locomotive of defendant over said line of interstate railway had hauled to the Canadian line, that is, the line between the Dominion of Canada and the United States, a train of cars hauling interstate freight, and at the particular time of the accident said engine on which plaintiff was employed and was operating was on the main line of said defendant's railway, at the town of Eastport, Idaho, being at or near the said international line between said two countries, and was there awaiting the coming of another interstate train from Canada which was then being hauled and operated toward said point

where plaintiff and his engine were standing, the purpose of plaintiff waiting at said point on said line being that as soon as the said train of interstate cars would arrive, it became plaintiff's duty, in the operation of said engine, to couple on to said cars and to continue the interstate transportation and transportation between said Dominion of Canada and the United States of said interstate and international traffic.

IV.

That at the time of the happening of the accident hereinafter mentioned plaintiff was employed in interstate commerce by [3] the defendant in doing and performing necessary acts and things as an incident to and necessary to be done in assisting and aiding and performing the employment of the act of interstate commerce in which defendant was engaged.

V.

That while plaintiff was employed as aforesaid, and while the said locomotive was standing on said main line of defendant's railway, plaintiff, in the performance of his duty as an employee aforesaid, stepped upon a certain metal apron attached to the said locomotive and extending over and across the space between the locomotive and the tender, except at either end of said space, and while stepping upon said metallic apron plaintiff slipped upon said apron and fell through the space between the locomotive and the tender not covered by said apron, causing the injuries hereinafter complained of.

VI.

That the cause of plaintiff's fall and slipping on said apron was the fact that the defendant, in violation of the Federal Safety Appliance Act, and that certain act, and the Federal Locomotive Boilers Inspection Act of Congress of the United States known as the Federal Employers Liability Act, had negligently and carelessly failed to conform to the requirements of said safety appliance act, and the rules and regulations of the United States Interstate Commerce Commission and the laws, rules and instructions governing and controlling the application of the Federal Locomotive Boiler Inspection Law, and the requirements of said Interstate Commerce Commission with reference thereto called Rules and Instructions for Inspection and Testing of Steam Locomotives and Tenders as amended March 4, 1915, and particularly that part of the rules, regulations and requirements of said Interstate Commerce Commission designated as Section 117, which reads as follows:

“Cab aprons.—Cab aprons shall be of proper length and width to insure safety. Aprons must be securely hinged, maintained in a safe and suitable condition for service, and roughened, or other provision made, to afford secure footing.”

And rule 152(c) which reads as follows:

(c) “The minimum width of the gangway between locomotive and tender, while stand-

ing on straight track, shall be sixteen (16) inches."

VII.

That defendant constructed and permitted to be used upon said locomotive an apron that was perfectly smooth, was not maintained in a suitable and safe condition for use, was not roughened or otherwise made to afford secure footing, and that along that side of said apron next the tender there was attached thereto and forming a part of thereof a metallic strip approximately four inches in width extending the full length of said apron, which extension never had been roughened and was not roughened in any way at the time of said accident, but was perfectly smooth at said time; that said apron was approximately nine (9) inches too short at each end to insure safety, thus leaving a hole between the front tender sill and tail piece on the locomotive thirteen (13) inches wide by sixteen (16) inches long; that, by reason of said hole there were only approximately eight and one-half ($8\frac{1}{2}$) inches in width of standing space at the gangway between the cistern on [4] said tender and said hole at or in the vicinity of the place where plaintiff slipped as aforesaid, thus making an extremely narrow and dangerous standing place or passage way between said cistern and the said hole.

VIII.

That said accident occurred to plaintiff about 5:40 P. M. on the 28th day of July, 1919; that said locomotive was for a long time prior to said acci-

dent commonly used and employed on said interstate line of railway with the apron hereinafter described, constructed and maintained in the manner and form hereinbefore pleaded.

IX.

That as a contributing cause to plaintiff's slipping on said apron, the defendant negligently and carelessly so constructed the slack adjustment between the locomotive and the tender that it so interfered with said apron that it did not fit smoothly, or was not on a level with the floor of said tender, as a result of which said apron extended upward from the floor of said tender a distance of about an inch and a half, which fact plaintiff was not advised of and did not realize until after said accident, and as he stepped backward upon said apron and near the edge closer to the tender, his foot in some manner caught in said apron, or on the edge thereof, on account of said space between the top of said apron and the floor of said tender, causing him to slip on said smooth surface of said apron.

X.

That by reason of plaintiff's slipping on said apron on or near to said narrow space aforesaid, plaintiff was caused to fall through said hole down and out of said cab and locomotive on to the ground below, thus causing the injuries hereinafter mentioned. That in falling out of said cab and locomotive, as hereinbefore pleaded, plaintiff's right elbow and the joint thereof were greatly injured, bruised, wrenched and strained, and the right elbow

joint fractured by what is known as a T-shaped comminuted fracture of the lower end of the humerus, and which greatly involved the elbow joint, causing extreme and excruciating pain and suffering, ever since the time of said injury, and greatly limiting and impairing the use of said arm, and especially the elbow joint, and rendering it impossible for plaintiff to perform the duties of locomotive engineer, in which he had been engaged for a great many years, and the only occupation with which plaintiff is familiar. That plaintiff's earning power and ability have been greatly impaired, and will continue to be greatly impaired during the balance of his life.

XI.

That at the time of said accident plaintiff was earning and capable of earning wages to the amount of \$275.00 to \$325.00 per month, and was constantly employed; that he was in perfect health; that at all times since said accident he has been unable to perform any labor or earn any money, which has caused him a specific loss in wages, up to the time of the commencement of this action, in the sum of \$7,200.00.

XII.

That by reason of said accident the plaintiff was compelled [5] to and did undergo a surgical operation and manipulation and working over by said doctors for the purpose of attempting to get motion in said elbow, all of which caused plaintiff extreme and excruciating suffering constantly, and plaintiff still suffers extreme pain from said in-

jury, and is informed and believes, and therefore states, that he will continue to suffer said pain for the balance of his natural life.

XIII.

That said injuries are permanent and plaintiff will never be able again to perform the duties which he had performed heretofore or earn the money which he had theretofore earned and was able heretofore to earn, and he has become a permanent cripple, and his whole physical system has been greatly shocked by the pain and suffering endured on account of said injury, all of which will be permanent.

XIV.

That by reason of the facts hereinbefore alleged, and the negligence and carelessness of defendant, plaintiff is and has been damaged in the sum of Forty Thousand Dollars (\$40,000) no part of which has been paid.

WHEREFORE, plaintiff prays for judgment against defendant in the sum of Forty Thousand Dollars (\$40,000) and his costs and disbursements, and for general relief.

GEORGE D. AYERS,

Attorney for Plaintiff, 514 Ziegler Building, Spokane, Washington.

State of Washington,
County of Spokane,—ss.

George E. Miller, being first duly sworn, on oath says that he is the plaintiff within named, that he has read the foregoing complaint, knows the con-

tents thereof, and that the same is true as he verily believes.

GEO. E. MILLER.

Subscribed and sworn to before me this 27th day of July, 1921.

JAMES T. HALL,

Notary Public, Residing at Spokane, Washington.

Filed in the U. S. District Court, Eastern District of Washington. Jul. 27, 1921. Wm. H. Hare, Clerk. H. J. Dunham, Deputy. [6]

United States of America in the District Court of
the United States, Eastern District of Wash-
ington, Northern Division.

Action brought in the said District Court, and the
Complaint filed in the office of the Clerk of
said District Court in the City of Spokane.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY CO.,
a Corporation,

Defendant.

Summons.

GEO. D. AYERS,

Plaintiff's Attorney.

The President of the United States of America,
GREETING to Spokane International Rail-
way Co., a Corporation:

You are hereby summoned to appear in the Dis-

trict Court of the United States, for the Eastern District of Washington, Northern Division, holding terms at the City of Spokane, within twenty days after service of this summons, exclusive of the day service, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you, according to the demand of the complaint, now on file in the office of the clerk of said court, a copy of which is herewith served upon you.

WITNESS the Honorable FRANK H. RUDKIN, Judge of the United States District Court for the Eastern District of Washington, and the seal of said District Court this 27th day of July, 1921.

W. H. HARE,
Clerk.

By _____,
Deputy Clerk.

United States of America,
Eastern District of Washington,—ss.

I hereby certify and return that I have personally served the within summons, together with the complaint in the within-entitled action, upon the within-named defendant by delivering to and leaving a true copy of the said summons and complaint with The Spokane & International Railway Co., by serving A. T. Harrick, as secretary of said Spokane & International Ry. Co., at Spokane, Wash.

J. E. McGOVERN,
United States Marshal.
By J. W. Dennison,
Deputy.

July 27, 1921.

Fees: \$2.06.

[Endorsed]: No. 3716. U. S. District Court, Eastern District of Washington. George E. Miller vs. Spokane International Railway Company. Summons. Filed in the U. S. District Court, Eastern District of Washington. Jul. 23, 1921. W. H. Hare, Clerk. [7]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY
COMPANY, a Corporation,

Defendant.

Answer.

The defendant for answer to plaintiff's complaint alleges and says:

1. It admits the allegations of paragraph one thereof.

2. It admits that at the time of the happening of the accident to plaintiff, described in the complaint herein, the plaintiff was in defendant's employ as an engineer on one of its trains, and it denies each and every other allegation in paragraph two thereof.

3. It denies each and every allegation of paragraphs three, four and five thereof.

4. It admits that under the provisions of the Federal Locomotive Boiler Inspection Act of Congress of the United States, the Interstate Commerce Commission of the United States has attempted to make certain regulations known as section 117 which reads as set forth in the complaint herein and Rule 152 C, which reads as set forth in the complaint herein, and it denies each and every other allegation in paragraph six of said complaint.

5. It admits that an accident happened to plaintiff at about five-forty P. M., on the 28th day of July, 1919, and it denies each and every other allegation in paragraph eight of said complaint contained.

6. It denies each and every allegation of paragraph nine of said complaint. [8]

7. It denies each and every allegation of paragraph ten, eleven, twelve, thirteen and fourteen of said complaint.

And for a first, further and affirmative answer and defense, defendant alleges:

1. That if the plaintiff was injured at the time and place set forth in the complaint herein, the said injuries were occasioned by his negligence and his negligence contributed proximately thereto.

And for a second, further and affirmative answer and defense, defendant alleges:

1. That if plaintiff was injured at the time and place set forth in the complaint herein, his injuries

were caused by the ordinary risk of said employment and he assumed said risk.

And for a third, further and affirmative answer and defense, defendant alleges:

1. That heretofore, on to wit: the 11th day of January, 1921, the plaintiff herein instituted an action in the above-entitled court against the defendant herein, being cause #3716 and filed in this court and cause to be served upon the defendant, a complaint, a true and correct copy of which is hereto attached, marked Exhibit "A" and made a part hereof.

2. That thereafter such proceedings were had in said cause that on the 2d day of April, 1921, the defendant caused to be filed and served herein, an answer, a true and correct copy of which in words, letters and figures is hereto attached, marked Exhibit "B" and made a part hereof.

3. That thereafter such proceedings were had in said cause that the same came on for trial in this court before the Honorable Frank H. Rudkin, Judge presiding with a jury and evidence was received from plaintiff in support of the allegations of his complaint and from defendant in support of the allegations of its answer and thereafter, the jury in said cause, on the 27th day of April, 1921, rendered its verdict in favor of the defendant. [9]

4. That thereafter, on the 4th day of May, 1921, a judgment was duly rendered and entered in the above-entitled cause in the above-entitled court wherein and whereby it was adjudged that plain-

tiff take nothing by his said action, that the same be dismissed, that the defendant go hence without day, and recover of plaintiff its costs, which said judgment has never been vacated, modified or appealed from.

5. That thereafter on the 15th day of June, 1921, the plaintiff filed and served in this cause a motion for a new trial of same and thereafter, on the 20th day of January, 1922, by order of this Court, the said motion for a new trial was denied.

6. That on the 27th day of July, 1921, this action was instituted.

7. That the said accident described and set forth in the complaint herein is the same accident described and set forth in the former action brought by plaintiff being cause #3545 aforesaid.

WHEREFORE, defendant prays judgment that plaintiff take nothing by this action; that the same be dismissed, that defendant go hence without day and recover of plaintiff its costs herein.

ALLEN, WINSTON & ALLEN,

Attorneys for Defendant.

State of Washington

County of Spokane,—ss.

A. T. Herrick, being first duly sworn on oath deposes and says that he is the assistant secretary of the defendant corporation herein and as such makes this verification; that he has read the foregoing answer, knows the contents thereof and that the same are true as he verily believes.

A. T. HERRICK.

Subscribed and sworn to before me this 24th day of January, 1922.

F. D. ALLEN,
Notary Public for Washington, Residing at Spokane.

Rec'd copy.

GEORGE D. AYERS,

Atty. for Plf.

Jan. 28, 1922. [10]

Exhibit "A."

United States of America in the District Court of
the United States for the Eastern District of
Washington, Northern Division.

Action brought in the said District Court, and the
Complaint filed in the office of the Clerk of
said District Court in the City of Spokane.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY
COMPANY, a Corporation,

Defendant.

TURNER, NUZUM & NUZUM,
Plaintiff's Attorney.

The President of the United States of America,
GREETING To Spokane International Rail-
way Company, a corporation.

YOU ARE HEREBY SUMMONED to appear
in the District Court of the United States for the

Eastern District of Washington, Northern Division, holding terms at the city of Spokane, within twenty days after the service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid and in case of your failure so to do, judgment will be rendered against you, according to the demand of the complaint now on file in the office of the clerk of said court, a copy of which complaint is herewith served upon you.

WITNESS the Honorable FRANK H. RUDKIN, Judge of the United States District Court for the Eastern District of Washington and the seal of said District Court this 11th day of January, 1921.

W. H. HARE,
Clerk.

By _____,
Deputy Clerk. [11]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. —.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY
COMPANY, a Corporation,

Defendant.

COMPLAINT.

Plaintiff complains and alleges:

I.

That the Spokane International Railway Company, the above-named defendant, is now and was at all times herein mentioned a corporation, created organized and existing under and by virtue of the laws of the State of Washington, owning, operating and controlling an interstate line of railway within and between the states of Idaho and Washington, and engaged in interstate commerce as a common carrier.

II.

That at the time of the happening of the accident to plaintiff, hereinafter mentioned, he was in the employ of defendant as an engineer on one of its trains, being operated over its line of interstate railway, and hauling and transporting interstate freight and freight which had originated in whole or in part in the Dominion of Canada and whose destination was some point in the United States.

III.

That immediately prior to the time of the happening of the accident to plaintiff, hereinafter mentioned, plaintiff in the operation of said locomotive of defendant over said line of interstate railway had hauled to the Canadian line, that is, the line [12] between the Dominion of Canada and the United States, a train of cars hauling interstate freight, and at the particular time of the accident said engine on which plaintiff was employed and

was operating was on the main line of said defendant's railway at the town of Eastport, Idaho, being at or near the said international line between said two countries, and was there awaiting the coming of another interstate train from Canada which was then being hauled and operated toward said point where plaintiff and his engine were standing, the purpose of the plaintiff waiting at said point on said line being that as soon as the said train of interstate cars would arrive, it became plaintiff's duty, in the operation of said engine, to couple on to said cars and to continue the interstate transportation and transportation between said Dominion of Canada and the United States of said interstate and international traffic.

IV.

That at the time of the happening of the accident hereinafter mentioned, plaintiff was employed in interstate commerce by the defendant in doing and performing necessary acts and things as an incident to and necessary to be done in assisting and aiding and performing the employment of the act of interstate commerce in which defendant was engaged.

V.

That while plaintiff was employed as aforesaid, and while the said locomotive was standing on said main line of defendant's railway, plaintiff, in the performance of his duty as an employee aforesaid, stepped upon a certain metal apron attached to the said locomotive and extending over and across the space between the locomotive and tender, and while stepping upon said metallic apron plaintiff

slipped and fell, causing the injuries hereinafter complained of. [13]

VI.

That the cause of plaintiff's fall and slipping on said apron was the fact that the defendant, in violation of the Federal Safety Appliance Act and that certain act of Congress of the United States known as the Federal Employers Liability Act, had negligently and carelessly failed to conform to the requirements of said safety appliance act, and the rules and regulations of the United States Interstate Commerce Commission and the laws, rules and instructions governing and controlling the application of the Federal Locomotive Boiler Inspection Law and the requirements of said Interstate Commerce Commission with reference thereto, as amended March 4, 1915, and particularly that part of the rules, regulations and requirements of said Interstate Commerce Commission designated as Section 117, which reads as follows:

“Cab aprons.—Cab aprons shall be of proper length and width to insure safety. Aprons must be securely hinged, maintained in a safe and suitable condition for service, and roughened, or other provision made, to afford secure footing.”

VII.

That defendant constructed and permitted to be used upon said locomotive an apron that was perfectly smooth, was not maintained in a suitable and safe condition for use, was not roughened or otherwise made to afford secure footing.

VIII.

That said accident occurred to plaintiff about 5:40 P. M. on the 28th day of July, 1919; that said locomotive was for a long time prior to said accident commonly used and employed on said interstate line of railway with the apron hereinafter described, constructed and maintained in the manner and form hereinbefore pleaded.

IX.

That as a contributing cause to plaintiff's slipping on said apron the defendant negligently and carelessly so constructed said [14] apron that it did not fit smoothly or was not on a level with the floor of said tender, as a result of which said apron extended upward from the floor of said tender a distance of about an inch or an inch and a half which fact plaintiff was not advised of, and did not realize until after said accident, and as he stepped backward upon said apron and near the edge closer to the tender, his foot in some manner caught in said apron, or on the edge thereof, on account of said space between the top of said apron and the floor of said tender, causing him to slip on said smooth surface of said apron.

X.

That by reason of plaintiff's slipping on said apron the same caused him to fall down and out of said cab and locomotive on to the ground below, causing the injuries hereinafter mentioned. That in falling out of said cab and locomotive, as hereinbefore pleaded, plaintiff's right elbow and the joint thereof were greatly injured, bruised,

wrenched and strained and the right elbow joint fractured by what is known as a T-shaped comminuted fracture of the lower end of the humerus and which greatly involved the elbow joint, causing extreme and excruciating pain and suffering, ever since the time of said injury and greatly limiting and impairing the use of said arm and especially the elbow joint, and rendering it impossible for plaintiff to perform the duties of locomotive engineer, in which he has been engaged for a great many years and the only occupation with which plaintiff is familiar. That plaintiff's earning power and ability have been greatly impaired and will continue to be greatly impaired during the balance of his life.

XI.

That at the time of said accident plaintiff was earning and capable of earning wages to the amount of \$275.00 to \$325.00 per month and was constantly employed; that he was in perfect health; that at all times since said accident he has been unable to perform any labor or earn any money which has caused him a specific loss in [15] wages, up to the time of the commencement of this action, in the sum of \$5,671.75.

XII.

That by reason of said accident the plaintiff was compelled to and did undergo a surgical operation and manipulation and working over by said doctors for the purpose of attempting to get motion in said elbow, all of which caused plaintiff extreme and excruciating suffering constantly, and plaintiff still

suffers extreme pain from said injury and is informed and believes and therefore states that he will continue to suffer said pain for the balance of his natural life.

XIII.

That said injuries are permanent and plaintiff will never be able again to perform the duties which he had performed heretofore or earn the money which he had theretofore earned and was able heretofore to earn, and he has become a permanent cripple, and his whole physical system has been greatly shocked by the pain and suffering endured on account of said injury all of which will be permanent.

XIV.

That by reason of the facts hereinbefore alleged and the negligence and carelessness of defendant, plaintiff is and has been damaged in the sum of Twenty-five Thousand Dollars (\$25,000.00), no part of which has been paid.

WHEREFORE, plaintiff prays for judgment against defendant in the sum of \$25,000.00 and his costs and disbursements and for general relief.

TURNER, NUZUM & NUZUM,

W. H. PLUMMER,

Attorneys for Plaintiff.

State of Washington,
County of Spokane,—ss.

George E. Miller being first duly sworn, on oath states that he is the plaintiff in the above-entitled cause; that he has heard the foregoing complaint,

knows the contents thereof and believes the same to be true.

GEORGE E. MILLER.

Subscribed and sworn to before me this 11th day of January, 1921.

F. E. COFFEEN,

Notary Public for Washington, Residing at Spokane. [16]

Exhibit "B."

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. —.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

ANSWER.

The defendant for answer to plaintiff's complaint alleges and says:

1. It admits the allegations of paragraph one thereof.

2. It admits that at the time of the happening of the accident to the plaintiff described in the complaint herein, plaintiff was in defendant's employ

as an engineer on one of its trains, and it denies each and every other allegation in paragraph two thereof.

3. It denies each and every allegation of paragraphs three, four and five thereof.

4. It admits that under the provisions of Federal Locomotive Boiler Inspection Acts, the Interstate Commerce Commission has attempted to make a certain regulation known as Section 117, in the language set forth in paragraph six and it denies each and every other allegation in said paragraph.

5. It denies each and every allegation in paragraph seven thereof.

6. It denies each and every allegation in paragraphs eight and nine thereof.

7. It denies each and every allegation in paragraph ten to sixteen thereof inclusive. [17]

And for a first, further, affirmative answer and defense, defendant alleges:

1. That if the plaintiff was injured at the time and place set forth in the complaint herein, said injuries were occasioned by his neglect and his neglect contributed proximately thereto.

And for a second, further, affirmative answer and defense, defendant alleges:

That if plaintiff was injured at the time and place set forth in the complaint herein, his injuries were caused by the ordinary risks of his said employment and he assumed the said risk.

WHEREFORE, defendant prays judgment that plaintiff take nothing by this action; that defend-

ant go hence without day and recover of plaintiff its costs herein.

ALLEN, WINSTON & ALLEN,
Attorneys for Defendant.

State of Washington,
County of Spokane,—ss.

A. T. Herrick being duly sworn, on oath says: That he is the assistant secretary of above-named defendant company, a corporation and that he makes this verification on behalf of said corporation; that he has read the foregoing answer and knows the contents thereof and that the same are true.

A. T. HERRICK.

Subscribed and sworn to before me this 16 day of April, 1921.

FRANK V. DuBOIS,
Notary Public for State of Washington, Residing
at Spokane.

Filed in the U. S. District Court, Eastern District of Washington. Jan. 28, 1922. Wm. H. Hare, Clerk. Eva M. Hardin, Deputy. [18]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COM-
PANY, a Corporation,

Defendant.

Reply.

Comes now the plaintiff in the above-entitled
action and for reply to defendant's answer herein
admits, denies and alleges as follows:

I.

As to defendants' first, further and affirmative
answer and defence plaintiff denies each and every
allegation thereof.

II.

As to defendants' second, further affirmative an-
swer and defence, plaintiff denies each and every
allegation thereof.

III.

As to defendants' third, further and affirmative
answer and defence,

1. Plaintiff admits the first paragraph thereof
except as to the number of said former action and
says that the number of said former action is 3545.

2. Plaintiff admits the second paragraph thereof.
3. Plaintiff admits the third paragraph thereof.
4. Plaintiff admits the fourth paragraph thereof.
5. Plaintiff admits the fifth paragraph thereof.
6. Plaintiff admits the sixth paragraph thereof.
7. Plaintiff admits that the falling out of the cab and locomotive and the physical injury, pain and suffering, the loss of employment, and the permanent impairment of plaintiff's earning power and ability resulting therefrom are the same as those referred to in plaintiff's former complaint mentioned in defendants' third affirmative defence, but also alleges that the negligence on the part [19] of the defendant and the present cause of action based thereon are not the same as those set forth in his said former complaint, and denies each and every other allegation in said paragraph seven of defendants' third affirmative defense.

WHEREFORE plaintiff renews the prayer of his complaint.

GEORGE D. AYERS,
Attorney for the Plaintiff.

State of Washington,
County of Spokane,—ss.

George E. Miller, having first been duly sworn, on oath says: That he is the plaintiff named in the above-entitled action, that he has read the foregoing reply, knows the contents thereof, and that the same is true, as he verily believes.

GEO E. MILLER.

Subscribed and sworn to before me this 16th day of February, 1922.

JAMES T. HALL,
Notary Public of the State of Washington, residing
at Spokane, Washington.

Rec'd copy of this reply, Feby. 17th, 1922.

ALLEN, WINSTON & ALLEN,
Attys. for Deft.

Filed in the U. S. District Court, Eastern District
of Washington. Feb. 17, 1922. Alan G. Paine,
Clerk. Eva M. Hardin, Deputy. [20]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COM-
PANY, a Corporation,

Defendant.

Motion.

The defendant moves the Court for an order dismissing this action with prejudice and with costs, for the reason and upon the ground that it appears affirmatively from the complaint, answer and reply herein that by the judgment of this Court in cause #3545 plaintiff was adjudged to be not entitled to

recover of and from the defendant, damages for injuries sustained in the accident referred to in the complaint herein and therefore, said judgment is a bar to this action. The matters and things set forth in the complaint herein have been formerly adjudicated against plaintiff and plaintiff is estopped to maintain this action.

This motion is based on the files, records and proceedings herein.

ALLEN, WINSTON & ALLEN,
Attorneys for Defendant.

Received copy Feby. 25, 1922.

GEORGE D. AYERS,
Attorney for Plaintiff.

Filed in the U. S. District Court, Eastern District of Washington. Feb. 25, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [21]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COM-
PANY, a Corporation,

Defendant.

Motion to Amend Complaint.

Comes now the plaintiff and moves to amend his complaint—

(a) By striking out of Paragraph VII thereof all of the language thereof beginning with the words “perfectly smooth” in line 51 and ending with the words “that said apron was” in line 59 thereof, so that the whole of said paragraph VII as amended shall read as follows:

“That defendant constructed and permitted to be used upon said locomotive an apron that was approximately nine (9) inches too short at each end to insure safety, thus leaving a hole between the front tender sill and tail piece on the locomotive thirteen (13) inches wide by sixteen (16) inches long; that by reason of said hole there were only approximately eight and one-half ($8\frac{1}{2}$) inches in width of standing space at the gangway between the cistern on said tender and said hole at or in the vicinity of the place where plaintiff slipped as aforesaid, thus making an extremely narrow and dangerous standing place or passage way between said cistern and the said hole.”

(b) By striking out the whole of paragraph IX.

(c) By numbering the remaining paragraphs of said complaint as IX to XIII inclusive consequently instead of X to XIV inclusive consecutively as in said unamended complaint.

Received copy 3/22/22.

ALLEN, WINSTON & ALLEN.

By His Attorney,
GEORGE D. AYERS.

Filed in the U. S. District Court, Eastern District of Washington. Mar. 22, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [22]

September, 1921, Term. 118th day.

Monday, March 27, 1922.

Court met pursuant to adjournment at 10 A. M.
Present: Honorable FRANK H. RUDKIN, F. R. JEFFREY, U. S. Dist. Attorney, A. F. KEES, U. S. Marshal, J. HAMILL, Crier, H. E. WEBB and C. H. CUMMINGS, Bailiffs, and ALAN G. PAINE, Clerk.

PROCEEDINGS:

* * * * *

3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY,

Defendant.

**Minutes of Court—March 27, 1922—Order Granting
Motion to Amend Complaint.**

* * * * *

And thereupon court adjourned until to-morrow.

FRANK H. RUDKIN,

Judge. [23]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COM-
PANY, a Corporation,

Defendant.

Amended Complaint.

Plaintiff complains and alleges:

I.

That the Spokane International Railway Company, the above-named defendant, is now and was at all times herein mentioned, a corporation, created, organized and existing under and by virtue of the laws of the State of Washington, owning, operating and controlling an interstate line of railway within and between the States of Idaho and Washington, and engaged in interstate commerce as a common carrier.

II.

That at the time of the happening of the accident to plaintiff, hereinafter mentioned, he was in the employ of defendant as an engineer on one of its trains, being operated over its line of interstate railway, and hauling and transporting interstate freight and freight which had originated in whole

or in part in the Dominion of Canada, and whose destination was some point in the United States.

III.

That immediately prior to the time of the happening of the accident to plaintiff, hereinafter mentioned, plaintiff, in the operation of said locomotive of defendant over said line of interstate railway had hauled to the Canadian line, that is, the line between the Dominion of Canada and the United States, a train of cars hauling interstate freight, and at the particular time of the accident said engine on which plaintiff was employed and was operating was on the main line of said defendant's railway, at the town of Eastport, Idaho, being at or near the said international line between said two countries, and was there awaiting the coming of another interstate train from Canada which was then being hauled and operated toward said point where plaintiff and his engine were standing, the purpose of plaintiff waiting at said point on said line being that as soon as the said train of interstate cars would arrive, it became plaintiff's duty, in the operation of said engine to couple on to said cars and to continue the interstate transportation and transportation between said Dominion of Canada and the United States of said interstate and international traffic. [24]

IV.

That at the time of the happening of the accident hereinafter mentioned, plaintiff was employed in interstate commerce by the defendant in doing and performing necessary acts and things as an incident

to and necessary to be done in assisting and aiding and performing the employment of the act of interstate commerce in which defendant was engaged.

V.

That while plaintiff was employed as aforesaid, and while the said locomotive was standing on said main line of defendant's railway, plaintiff, in the performance of his duty as an employee aforesaid, stepped upon a certain metal apron attached to the said locomotive and extending over and across the space between the locomotive and the tender, except at either end of said space, and while stepping upon said metallic apron plaintiff slipped upon said apron and fell through the space between the locomotive and the tender not covered by said apron, causing the injuries hereinafter complained of.

VI.

That the cause of plaintiff's fall and slipping on said apron was the fact that the defendant, in violation of the Federal Safety Appliance Act, and that certain act, and the Federal Locomotive Boilers Inspection Act, of Congress of the United States known as the Federal Employers Liability Act, had negligently and carelessly failed to conform to the requirements of said safety appliance act, and the rules and regulations of the United States Interstate Commerce Commission and the laws, rules and instructions governing and controlling the application of the Federal Locomotive Boiler Inspection Law, and the requirements of said Interstate Commerce Commission with reference thereto

called Rules and Instructions for Inspection and Testing of Steam Locomotives and Tenders as amended March 4, 1915, and particularly that part of the rules, regulations and requirements of said Interstate Commerce Commission designated as Section 117, which reads as follows:

“Cab aprons.—Cab aprons shall be of proper length and width to insure safety. Aprons must be securely hinged, maintained in a safe and suitable condition for service, and roughened, or other provisions made, to afford secure footing.”

And rule 152-C, which reads as follows:

(c) “The minimum width of the gangway between locomotive and tender, while standing on straight track, shall be sixteen (16) inches.”

VII.

That defendant constructed and permitted to be used upon said locomotive an apron that was approximately nine (9) inches too short at each end to insure safety, thus leaving a hole between the front tender sill and tail piece on the locomotive thirteen (13) inches wide by sixteen (16) inches long; that, by reason of said hole there were only approximately eight and one-half ($8\frac{1}{2}$) inches in width of standing space at the gangway between the cistern on said tender and said hole at or in the vicinity of the place where plaintiff slipped as aforesaid, thus making an extremely narrow and dangerous standing place or passageway between said cistern and the said hole. [25]

VIII.

That said accident occurred to plaintiff about 5:40 P. M. on the 28th day of July, 1919; that said locomotive was for a long time prior to said accident commonly used and employed on said interstate line of railway with the apron hereinafter described, constructed and maintained in the manner and form hereinbefore pleaded.

IX.

That by reason of plaintiff's slipping on said apron on or near to said narrow space aforesaid, plaintiff was caused to fall through said hole down and out of said cab and locomotive on to the ground below, thus causing the injuries hereinafter mentioned. That in falling out of said cab and locomotive, as hereinbefore pleaded, plaintiff's right elbow and the joint thereof were greatly injured, bruised, wrenched, and strained, and the right elbow joint fractured by what is known as a T-shaped comminuted fracture of the lower end of the humerus, and which greatly involved the elbow joint, causing extreme and excruciating pain and suffering, ever since the time of said injury, and greatly limiting and impairing the use of said arm, and especially the elbow joint, and rendering it impossible for plaintiff to perform the duties of locomotive engineer, in which he had been engaged for a great many years, and the only occupation with which plaintiff is familiar. That plaintiff's earning power and ability have been greatly impaired, and will continue to be greatly impaired during the balance of his life.

X.

That at the time of said accident, plaintiff was earning and capable of earning wages to the amount of \$275.00 to \$325.00 per month, and was constantly employed; that he was in perfect health; that at all times since said accident he has been unable to perform any labor or earn any money which has caused him a specific loss in wages, up to the time of the commencement of this action in the sum of Seventy-two Hundred Dollars (\$7,200.00).

XI.

That by reason of said accident the plaintiff was compelled to and did undergo a surgical operation and manipulation and working over by said doctors for the purpose of attempting to get motion in said elbow, all of which caused plaintiff extreme and excruciating suffering constantly, and plaintiff still suffers extreme pain from said injury, and is informed and believes, and therefore states, that he will continue to suffer said pain for the balance of his natural life.

XII.

That said injuries are permanent and plaintiff will never be able again to perform the duties which he has performed heretofore or earn the money which he had theretofore earned and was able heretofore to earn, and he has become a permanent cripple, and his whole physical system has been greatly shocked by the pain and suffering endured on account of said injury, all of which will be permanent.

XIII.

That by reason of the facts hereinbefore alleged, and the negligence and carelessness of defendant, plaintiff is and has been [26] damaged in the sum of Forty Thousand Dollars (\$40,000), no part of which has been paid.

WHEREFORE plaintiff prays for judgment against defendant in the sum of Forty Thousand Dollars (\$40,000) and his costs and disbursements, and for general relief.

GEORGE D. AYERS,
Attorney for Plaintiff, 514 Ziegler Building, Spokane, Washington.

State of Washington,
County of Spokane,—ss.

George E. Miller being first duly sworn on oath says: that he is the plaintiff within named, that he has read the foregoing complaint, knows the contents thereof, and that the same is true as he verily believes.

GEO. E. MILLER.

Subscribed and sworn to before me this 21st day of March, 1922.

JAMES T. HALL,
Notary Public Residing at Spokane, Wash.
Rec'd copy of above this 22d day of Mch., 1922.

ALLEN, WINSTON & ALLEN,
Attorneys for Deft.

Filed in the U. S. District Court, Eastern District of Washington. Mar. 27, 1922. Alan G. Paine, Clerk. [27]

United States District Court for the Eastern District of Washington.

No. 3716.

GEORGE E. MILLER

vs.

SPOKANE INTERNATIONAL RAILWAY CO.

Appearance of Attorneys for Defendant.

To the Clerk of the Above-entitled Court:

You will please enter my appearance as attorney for defendant in the above-entitled cause, and service of all subsequent papers, except writs and process, may be made upon said defendant, by leaving same with Allen, Winston & Allen, post-office address, Paulsen Building, Spokane, Wash., attorneys for defendant.

Notice—Attorneys will please endorse their own filings.

[Endorsed]: No. 3716. United States U. S. Dist. Court, Eastern District of Washington. George E. Miller vs. Spokane International Ry. Appearance. Filed in the U. S. District Court, Eastern Dist. of Washington. April 17, 1922. Alan G. Paine, Clerk. Eva M. Hardin, Deputy Clerk. Alex M. Winston, for Defendant. [27½]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY
COMPANY, a Corporation,

Defendant.

Plaintiff's Brief on Defendant's Motion to Dismiss.

In order not to stand upon technicalities, plaintiff without inquiry as to procedure, expressly waives any objection that may exist to defendant raising the question as to *res adjudicata* and as to splitting of actions at this stage of proceedings on motion to dismiss.

For the same reason, plaintiff agrees that, although his amended complaint was filed *after* the motion to dismiss (which technically might be said to apply only to the complaint before amendment) nevertheless defendant's motion to dismiss, as well as the present filed answer to the unamended complaint and plaintiff's reply thereto may, if defendant so chooses, stand as if filed *after* the filing of the amended complaint.

Plaintiff, however, calls attention to the fact that every allegation of specific acts either of negligence or of violation of the Federal Law that could

have been raised in the former action of Miller vs. Spokane International Railway Company, No. 3545 has been eliminated in the amended complaint, so that the question is squarely raised before this Honorable Court whether the fact that the injuries suffered by the plaintiff, evidence of which was introduced in the former trial *upon the question of damages*, being the same injuries in part at least upon which evidence will be introduced in the instant case, when it comes to trial, is a bar to the trial of the instant case. [28]

Plaintiff does not deny that the suffering of "injuries" in the commonplace English meaning of reference to physical and mental facts, as distinguished from "*injuria*" are a prerequisite to maintaining an action, but does deny emphatically that under the Federal Statutes upon which he bases his rights of action the "*injuria*" are the same as the "*injuria*" upon which plaintiff relies in the Common Law Action of Negligence. This statement is made in general terms at present for the purpose only of clearing away the ground for discussion. What specifically is meant, will be stated more in detail below.

Also with the intention of clarifying the discussion the plaintiff states that counsel for the defendant unconsciously did not state accurately what he alleged in his argument before the Court, to be admissions in plaintiff's reply to defendant's answer; and it is important to note the difference between the real substance of plaintiff's admission and what counsel for defendant (erroneously plain-

tiff thinks) considers to have been the substance of plaintiff's admission.

Defendant's learned counsel stated in his argument that plaintiff in his reply to defendant's answer admitted that the "accident" alleged to have occurred is the same "accident" in the case of both lawsuits.

It may make no difference. All depends upon the connotation of the word "accident." If the word "accident" connotes *only* the tripping of the plaintiff, his falling out of the cab and his physical and mental injuries resulting therefrom, all that, the plaintiff readily admits, will be found referred to in both lawsuits, but if any one item of alleged failure in legal duty on defendant's part is a part of the connotation of the word "accident" as applied in this case, then the plaintiff **EMPHATICALLY AND MOST STRENUOUSLY DENIES** any such admission in his reply.

The distinction, often not well noted, between "injuries" as used in the Federal Act and "*injuria*" and the different possible connotations of the word "accident" should be borne in mind most carefully. Otherwise, particular danger exists in the instant case of being misled by the "fallacy of ambiguous middle" or of using the middle term in two different senses in the major and minor premises [29] of the syllogism.

Specifically what the plaintiff did admit is shown in paragraph 7 of his reply, as follows:

"Plaintiff admits that the falling out of the cab and locomotive and the physical injury, pain and

suffering, the loss of employment, and the permanent impairment of plaintiff's earning power and ability resulting therefrom are the same as those referred to in plaintiff's former complaint mentioned in defendant's third affirmative defence, but also alleges that the negligence on the part of the defendant and the present cause of action based thereon are not the same as those set forth in his said former complaint, and denies each and every other allegation in said paragraph seven of defendant's third affirmative defence."

Assuming for the sake of argument that the case of *Jenkins et al. vs. Atlantic Coal R. Co.*, 179 Fed. 535 (cited by counsel for defendant) correctly states the law in Common Law actions of negligence, paragraph 7 of plaintiff's reply, would be an admission (inferentially at least) that both the accident and the "*injuria*" were identical in both the former and the present action of the plaintiff against the defendant, whether the word "accident" was used in the two different senses referred to above or not, IF THESE TWO CASES OF MILLER VS. THE SPOKANE INTERNATIONAL RAILWAY COMPANY HAD BEEN CASES FOUNDED UPON THE COMMON LAW ACTION OF NEGLIGENCE, BUT NOT WHEN IN FACT THESE ACTIONS ARE BROUGHT UNDER THE FEDERAL STATUTE.

In the *Jenkins* case, the plaintiff had previously brought an action in a South Carolina court against one defendant railroad company for "damages for the same injuries" as set forth in the second

complaint against another defendant railroad company; and it was contended by the defendant in the federal court case that privity existed between the defendant railroads in each case and that the judgment for the defendant in the state court was a bar to the action in the federal court. [30]

The question arose in the Circuit Court of the United States for the District of South Carolina on plaintiff's motion to strike from the defendant's answer the defence outlined above. This motion the Court denied.

The Circuit Court of the United States held that privity did exist between the defendants in each of the cases.

Secondly, the Court said that the plaintiff's cause of action was that of a passenger against a carrier IN NOT SAFELY CARRYING HER. NOTE HERE THE GENERAL DUTY OF SAFE CARRIAGE UNDER THE COMMON LAW AS AGAINST THE SPECIFIC DUTY TO DO SPECIFIC THINGS PLACED UPON CARRIER BY THE FEDERAL STATUTE, WHICH WILL BE QUOTED LATER.

The Court showed by the evidence that also the specific acts of negligence in violation of the general duty imposed by the Common Law, shown in the two cases were really identical, as disclosed by the evidence. Hence this was of itself sufficient ground for the Court's decision in the federal case.

But the Court went on and said, page 538 (the capitalization of sentences being ours), whether that were so or not, a party who had a cause of

action growing out of a tort, cannot be permitted to divide the tort, and make it the subject of different suits.

“The plaintiff’s cause of action here is that as a passenger, she had a right to safe carriage. That is her primary right, and there is a corresponding primary duty devolving upon the carrier to safely carry her. It was for this neglect of duty—this delict—resulting, as she alleged in injury to her, that she claims damages against the carrier. THIS IS AN ENTIRE CLAIM FOR A SINGLE TORT, AND ALL THE VARIOUS ITEMS TENDING TO SHOW NEGLIGENCE ON THE PART OF THE CARRIER AND ALL OF THE ELEMENTS OF DAMAGE TO HER RESULTING FROM SUCH NEGLIGENCE MUST BE INCLUDED IN THE ONE ACTION WHEREIN SHE IS ENTITLED TO RECOVER SUCH COMPENSATION AS SHE MAY BE ENTITLED TO FOR EACH AND ALL OF SUCH ITEMS.”

In commenting upon this case, let us note that the Common Law action of Negligence arose as one of the forms of the old action (under the statute of Westminster II, 13 Edward I, C. 24) of Trespass on the case and that three elements are essential to its existence as an action of negligence; [31]

(1) The existence of a duty on the part of defendant to protect plaintiff from the injury.

(2) Failure of defendant to perform that duty; and

(3) Injury to plaintiff from such failure of defendant, 29 Cyc. 419, Article Negligence.

When any injury results to the plaintiff from failure of defendant to perform his LEGAL DUTY towards the plaintiff, a cause of action arises.

As was the case under the old statute of Westminster II, so also under the Federal Acts it is true that WHEN ANY INJURY RESULTS TO THE PLAINTIFF FROM FAILURE OF THE DEFENDANT TO PERFORM HIS LEGAL DUTY TOWARDS THE PLAINTIFF A CAUSE OF ACTION ARISES.

Consideration of both these laws, the old common law, based upon the ancient statute, and the modern federal laws discloses clearly the fact that the test as to the number of actions that can be maintained depends not only upon the question as to the number of injuries (using the word not as connoting "*injuria*" but as connoting physical, mental or pecuniary damage) but UPON THE NUMBER OF LEGAL DUTIES VIOLATED. One right of action exists (under both the ancient and the federal law), for *each legal duty violated, regardless* of the number of physical, mental or pecuniary injuries inflicted. The Jenkins case itself is clear upon this point. See *supra*.

The essential difference between the two laws lies in the fact that under the old law based on the ancient statute THE LEGAL DUTY CLEARLY WAS GENERAL, while, on the other hand, under the modern federal statutes, the LEGAL DUTY CLEARLY IS SPECIFIC.

Under act of April 22, 1908, Ch. 149, 35 Stat. L. 65, Barnes Federal Code, 8069, 8 Fed. Stat. Ann. (2d. ed.) page 1208, Compiled Stats. 8657, constituting part of the Federal Employers' Liability Act, also known as the "Sterling Act," and sometimes styled the "Second Employers' Liability Act" it is enacted (the large type being ours), that "Every common carrier, by railroad, while engaging in commerce between any of the several states or territories * * * or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury or death resulting in whole or in part * * * [32] by reason of ANY DEFECT OR INSUFFICIENCY, due to its negligence in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment."

The right of action according to the words of the act above quoted does not arise out of violation of a general primary duty of the defendant to furnish safe tools, a safe place to work, etc., and a violation of a corresponding general primary right of the plaintiff to have been furnished with safe tools and appliances and a safe place in which to work; but it arises out of a violation of plaintiff's right that there should not exist any specific defect by reason of which the plaintiff has suffered injury.

The particular rights of the plaintiff and the particular duties of the defendant towards the

plaintiff are found in the Federal Locomotive Boiler Inspection Law, so called, as amended March 4, 1915, and in the RULES AND INSTRUCTIONS FOR INSPECTION AND TESTING OF STEAM LOCOMOTIVES AND TENDERS, approved by orders of the Interstate Commerce Commission, dated October 11, 1915, June 30, 1916, November 13, 1916, December 26, 1916, December 17, 1917 and April 7, 1919.

See Act of Feby. 17, 1911, Ch. 103, 36 Stat. (913 et seq. or Locomotive Boiler Inspection Law.)

Act of March 4, 1915, Ch. 169, 38 Stat. L. 1192 or amendment of the above law. (See 8 Fed. Stat. Ann. 2d. Ed., pages 1200-1206, Barnes Federal Code, Secs. 8046 to 8057, both inclusive, U. S. Compiled Statutes, Sections 8630 to 8629 inclusive and Secs. 8639b and 8639c.) See also laws, Rules and Instructions of Interstate Commerce Commission referred to above.)

By these various statutes and rules and regulations made by the Interstate Commerce Commission, it appears—

(a) By the Boiler Locomotive Inspection Law that it is unlawful for any common carrier engaged in interstate or foreign traffic to use any locomotive engine propelled by steam power unless its boiler and appurtenances are in a proper condition safe to operate; [33]

(b) By the amendment above referred to (approved March 4, 1915,) the Locomotive Boiler Inspection Law is made to apply to and include the

entire locomotive and tender and all parts and appurtenances thereof;

(c) By section 5 of the original act (the Boiler Locomotive Inspection Law) which by the amendment referred to in (b) is made to apply to the entire locomotive and tender and all parts and appurtenances thereof, each carrier subject to this act, is required to file rules and instructions for inspection with the chief inspector appointed under Section 3 of the act by the President of the United States, and these rules and instructions subject to such modifications as the Interstate Commerce Commission requires, shall become obligatory upon the carrier. If the carrier fails to file the rules and instructions, the chief inspector is required to prepare such, which after approval by the Interstate Commerce Commission, shall be obligatory upon the carrier, and a violation of such by the carrier is made unlawful and is subject to punishment under the act;

(d) That the Chief Inspector also is required under Section 5 of the original act to make all needful rules, regulations and instructions for the conduct of his office and for the government of the district inspector required under the act;

(e) That June 2, 1911, the Interstate Commerce Commission, after noncompliance by many carriers with the directions to make rules and instructions, and on the request of all the carriers who had made such rules and instructions prepared new rules and instructions for all carriers under the act;

(f) That thereafter these rules, regulations and instructions were modified and added to by the Interstate Commerce Commission from time to time applying to the locomotives, tenders and all of their parts and appurtenances;

(g) That among the rules and instructions in accordance with the amendment of March 4, 1915, to the Boiler Locomotive Inspection Act, approved by orders of the Interstate Commerce Commission see page 54 of Laws, Rules and Instructions for Inspection, and Testing of Steam Locomotives and Tenders is rule 117 as follows: [34]

“117 cab aprons—Cab aprons shall be of proper length and width to insure safety, * * *

Also among said rules (see page 66) is the following:

“152 * * * (c) The minimum width of the gangway between locomotive and tender, while standing on straight track shall be 16 inches”;

(h) That under Section 9 of the Boiler Locomotive Inspection Act “any common carrier violating this act or any rule or regulation made under its provisions * * * shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States Attorney having jurisdiction in the locality” etc.

It is therefore respectfully submitted under the above quoted and referred to rules, regulations and instructions;

1. That the defendant in the instant case is liable to the plaintiff, not for the violation of a

general duty to provide him with safe tools and appliances and a reasonably safe place in which to work, but for *any injury resulting from any defect due to its negligence.*

2. THAT THE DEFENDANT IS LIABLE TO THE PLAINTIFF FOR ANY INJURY RESULTING FROM THE SPECIFIC ACT OF NEGLIGENCE ARISING FROM ITS VIOLATION OF ANY PART OF RULE 117 OR OF RULE 152-C OF THE LAWS, RULES AND INSTRUCTIONS ABOVE QUOTED.

3. THAT THE RULE IN THE JENKINS CASE CITED BY THE LEARNED COUNSEL FOR THE DEFENDANT DOES NOT APPLY TO THE INSTANT CASE.

The United States Supreme Court has said on the question of negligence, "IT IS OF COURSE SETTLED THAT IF THE EQUIPMENT WAS IN FACT DEFECTIVE OR OUT OF REPAIR, THE QUESTION WHETHER THIS WAS ATTRIBUTABLE TO THE COMPANY'S NEGLIGENCE IS IMMATERIAL." *Spokane etc. R. Co. vs. Campbell*, 241 U. S. 497, S. C. 683, 60 U. S. (L. Ed.) 1125 at 1134. *United States vs. Oregon-Washington R. & N. Co.*, 6, 213 Fed. 689 at 690 per Judge Rudkin. [35]

A VIOLATION OF THE SAFETY APPLIANCE ACT IS NEGLIGENCE PER SE.

Lemme vs. Texas etc. Ry. Co., 141 L. A. 769,
75 *sc.* 676.

See, also, Judge Rudkin's statement in *Campbell in Spokane & Inland Empire R. Co.*, 188 Fed-

eral 516, pp. 517, 518, "When a statute is designed to protect a particular class of persons against a particular class of injuries, a violation of the statutory duty constitutes negligence *per se* whenever one of the protected class is injured from a cause against which the statute was designed to protect him." A good illustration of the fact that the rights granted and duties imposed by the Federal Acts under discussion are SPECIFIC and not general is illustrated in the remarks of Buffington, Circuit Judge, in U. S. vs. Erie R. Co., 212 Fed. 853, at 859. "These duties of air-brake equipment and air-brake use are separate and distinct," etc. See, also, U. S. vs. Pere Marquette Co., 211 Fed. 221;

Louisville & N. R. Co. vs. Layton, 243 U. S. 617, 37 Sup. Ct. 456, 61 L. Ed. 931, at 933;

St. Joseph & Grand Island Railway Co. vs. Moore, 243 U. S. 311, 37 Sup. Ct. Ref. 278, 61 L. Ed. 741 at 745, 746.

The conclusion seems unavoidable.

(a) That the rules requiring cab aprons to be of proper length and width to insure safety and the minimum width of the gangway between locomotive and tender, while standing on straight track to be 16 inches, are specific rules under the safety appliance acts designed to protect a particular class of persons, namely locomotive engineers and firemen, against a particular class of injuries.

(b) The violation of this specific duty is negligence *per se* and

(c) That therefore a specific right of action exists on the part of the plaintiff against the defendant in the instant case for the specific acts of negligence mentioned in the complaint.

Furthermore the violation of the rules referred to above constitute penal offenses under Section 9 of the Locomotive Boiler Inspection Law. See *supra*. [36]

It is plain under the words of section 9 that the defendant carrier is liable to the imposition of the penalty for each rule or regulation violated.

Such being the case, a civil liability in favor of the person injured exists as well as the penal liability.

When the protection imposed by the Statute for violation of which the penalty is imposed is for the benefit of a class or individual of a class, an individual right of action accrues to the party injured.

1 C. J. (Article Actions) 957 and note, 30;

Harrod vs. Latham Mercantile and Commercial Co., 77 Kan. 466, 99 Pac. 10;

Berdos vs. Tremont and Suffolk Mills, 209 Mass. 489, 95 N. E. 876;

The Union Pacific Railway Company vs. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, 443.

San Antonio vs. A. P. R. Co. vs. Wagner 241 U. S. 476, 36 Sup. Ct. 626, 60 L. Ed. 1110. In this last-mentioned case, the Supreme Court distinctly says, Page (L. Ed. 1117) THAT A DISREGARD OF THE COMMAND OF THE SAFETY APPLI-

ANCE ACT "IS A WRONGFUL ACT, AND WHERE IT RESULTS IN DAMAGE to one of the class for whose special benefit the Statute was enacted, the right to recover the damages is implied." "If this act is violated, the question of negligence in the general sense of want of care is immaterial, 241 U. S. 43, and cases there cited. But the two Statutes are *in pari materia*, and where the Employers' Liability Act refers to "any defect or insufficiency, DUE TO ITS NEGLIGENCE, in the cars, engines, appliances" etc., it is clearly the legislative intent to treat a violation of the Safety Appliance Act as 'negligence'—what is sometimes called negligence *per se*."

The caps above were ours.

Mr. Justice Moody, St. Louis, I. M. & S. Ry. Co. vs. Taylor, 210 U. S. 281, 52 L. Ed. 1061 emphasizes the point that the duty imposed by the safety appliance acts is SPECIFIC, and that the violation of each specific duty, when resulting injury, is actionable.

On page 1067 he says "We need not enter into the wilderness of cases upon the common law duty of the employer to use reasonable care [37] to furnish his employee reasonably safe tools, machinery and appliances, or consider when and how far that duty may be performed * * * In the case before us, the liability of the defendant does not grow out of the common law duty of master and servant. The Congress, not satisfied with the Common Law duty, and its resulting liability, has prescribed and defined the duty by Statute * * * The

obvious purpose of the legislature was to supplant the qualified duty of the Common Law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured thereby." Can anything be more plain?

In order that the rule of *res adjudicata* or the rule against splitting of actions shall apply, the second action must refer to a legal duty, the violation of which was the basis of the first action. This was not the case here, for reasons above given.

Before the rule of *res adjudicata* or the rule against splitting of actions can apply, there must be in the two actions to which the rules are sought to be applied identity (1) of subject matter, (2) of cause of action, (3) of parties and (4) of quality of persons.

Eteburn vs. Neary, 186 Pac. 457;

Privett vs. U. S., 261 Fed. 351;

Hoffmeier vs. Trost, 85 Atl. (N. J.) 221.

A proper test to apply in determining this question is to ascertain whether the same evidence which is necessary to sustain the second action would have been sufficient to authorize a recovery in the first.

Hoffmeier et al. vs. Trost (*supra*).

Sarson vs. Maccia, 108 Atl. 109.

It is plain that applying this test judgment in the first Miller action is not a bar to the second,

and that the rule against splitting actions is not violated in bringing the second suit.

If full recovery of damages had been had on judgment for plaintiff following a verdict in his favor in the first suit, doubtless recovery could not have been had in the second suit, not because [38] the legal duty violated was the same in each suit (for plainly it was not) because the injuries were the same, and the plaintiff having been compensated once, he could not be compensated a second time.

Besides, the fact that two distinct acts of negligence resulting in the same injuries is no bar to an action based on one of them.

See remarks of District Judge Shiras in *Voelker vs. Chicago M. & St. P. Ry. Co.*, 116 Fed. 867 at 875.

The objection that under the rule for which plaintiff contends, a defendant could be vexed with continual and numerous lawsuits. We respectfully submit, is not a valid objection in the instant case.

(1) Because the short period of the Statute of Limitations (2 yrs.) practically negatives the idea of continual vexation.

(2) Because the plain words of the Statutes are not to be disregarded (see Mr. Justice Moody's remarks on that point in *St. Louis M. & S. Ry. Co. vs. Taylor*, *supra*, 52 L. Ed., at page 1068), and

(3) Because the essential purpose of the acts is the protection of the lives and limbs of employees and passengers and railroads are required strictly to comply with its provisions.

See remarks of District Judge Reed in U. S. vs. Chicago Great Western Ry. Co., 162 Fed. 775 at 778. See also remarks of District Judge Van Fleet in U. S. vs. Northwestern Pac. R. Co., 235 Fed. 965, bottom of pages 969 and 970.

Plaintiff respectfully submits that defendant's motion to dismiss should be denied.

GEORGE D. AYERS,

Plaintiff's Attorney.

P. O. Address, 514 Ziegler Bldg., Spokane, Wash.

Rec'd copy April 12-'22.

ALLEN, WINSTON & ALLEN.

G. [39]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COM-
PANY, a Corporation,

Defendant.

Memorandum.

GEORGE D. AYERS, Attorney for the Plaintiff.

ALLEN, WINSTON & ALLEN, Attorneys for the
Defendant.

RUDKIN, District Judge.—This is an action to
recover damages for personal injuries. The an-

swer interposes the defense of *res adjudicata*, and inasmuch as that defense has not been denied the defendant has moved for judgment on the pleadings. One of the regulations of the Interstate Commerce Commission regarding cab aprons is as follows:

“Cab-aprons shall be of proper length and width to insure safety. Aprons must be securely hinged, maintained in a safe and suitable condition for service, and roughened, or other provision made, to afford secure footing.”

In a former action prosecuted by the same plaintiff to recover for the same injuries the neglect charged in the complaint was twofold. First, because the cab-apron was not roughened or other provision made to afford a secure footing as required by the regulations of the Interstate Commerce Commission; and second, because the apron extended upwards from the floor of the tender a distance of from one to one and one-half inches.

Upon a trial of that action there was a verdict and judgment for the defendant.

In the second action to recover damages for the same wrong and for the same injuries a recovery is sought on the ground that the cab-apron was not of proper length and width to insure safety. [40] Upon the argument I was of opinion that the former judgment was a complete bar, and an examination of the authorities only tends to confirm me in that opinion. The plaintiff earnestly insists that he has a right of action for each and every breach of a statutory duty and that a judgment

against him in an action for one breach is no defense to a second action for another and different breach, although the injuries complained of in both actions are one and the same. To this contention I cannot yield assent, and the decisions in both the state and federal courts are against it.

In *Sayward vs. Thayer*, 9 Wash. 22, Chief Justice Dunbar said:

“The general doctrine is that the plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising a reasonable diligence, might have brought forward at the time.”

To the same effect, see *Cromwell vs. County of Sac.*, 94 U. S. 351, and *Board of Comm’rs vs. Platt*, 79 Fed. 567. The scope of the estoppel is not the same in all cases. Thus, where the second action is between the same parties but upon a different claim or demand, the estoppel is limited to the points in issue and actually determined in the first action. But where the second action is upon the same claim or demand the estoppel extends not only to the points at issue in the first action but to all claims and all defenses that might have been advanced or interposed by the respective parties. This distinction is clearly pointed out in the *Cromwell* case, *supra*. And inasmuch as the second action here is upon the same claim or demand as was the first, the

estoppel extends not only to the matters at issue in the former action but to each and every claim of negligence which the plaintiff might advance in support of his right of recovery. No doubt, as claimed by the plaintiff, the law gives a right of action for each and every breach of a statutory duty, but where several breaches result in a single injury it gives but one right of action and no more. And under this rule it is entirely immaterial whether the charge of negligence is based on the rules of the common law or upon a state or federal statute. [41]

As said by the Court in *Jenkins vs. Atlantic Coast Line R. Co.*, 179 Fed. 535, 539:

“This is an entire claim for a single tort, and all the various items tending to show negligence on the part of the carrier, and all of the elements of damage to her resulting from such negligence must be included in the one action wherein she is entitled to recover such compensation as she may be entitled to for each and all of such items.”

“‘Experience has disclosed that for the security of rights and the preservation of the repose of society a limit must be imposed upon the facilities for litigation.’”

Or, as said by Judge Dunbar in *Sweeney vs. Waterhouse & Co.*, 43 Wash. 613, 616:

“It is hardly worth while to go into a discussion of the doctrine of *res adjudicata* and the cases cited thereon. This Court has, in more recent cases, somewhat modified the doc-

trine as announced in the earlier cases, where the old rule was laid down that the plea of *res adjudicata* applies not only to points which were raised, but to those which might have been raised in the trial of the former action. But no court, we think, has gone so far as to allow a litigant to experiment with a court by trying his case piecemeal. The cause of action which the appellants now urge was available to them at the former trial, the assignments set forth in the complaint having been obtained prior to the commencement of the first action. They should not be allowed to split their causes of action, try their case out on a part of the causes, and if they fail, commence another action setting forth the other causes."

The motion for judgment on the pleadings is therefore granted, and the action is dismissed.

Filed in the U. S. District Court, Eastern District of Washington. April 17, 1922. Alan G. Paine, Clerk. By Eva M. Hardin, Deputy. [42]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COM-
PANY, a Corporation,

Defendant.

Judgment.

This cause coming on to be heard on defendant's motion to dismiss and for judgment on the pleadings, the Court having heard argument and being advised in the premises, it is by the Court

ORDERED, ADJUDGED AND DECREED that said motion be and the same is hereby granted; that plaintiff go hence without day and take nothing by this action; that the same be dismissed and that defendant, Spokane International Railway Company, a corporation, do have and recover of and from plaintiff, George E. Miller, its costs herein in the sum of \$22.90 dollars, as taxed by the Clerk of this Court, and let execution issue therefor.

Done in open Court this 24th day of April, A. D. 1922.

FRANK H. RUDKIN,
Judge.

Approved as to form:

GEORGE D. AYERS,
Pltfs. Atty.

Copy received April 24, 1922.

GEORGE D. AYERS,
Pltfs. Atty.

Filed in the U. S. District Court, Eastern District of Washington. April 24, 1922. Alan G. Paine, Clerk. By Eva M. Hardin, Deputy. [43]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

AT LAW—No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COM-
PANY, a Corporation,

Defendant.

Petition for Writ of Error.

To the Honorable FRANK H. RUDKIN, Judge of
the District Court aforesaid.

Now comes George E. Miller, plaintiff in the
above-entitled action by George D. Ayers his at-
torney and respectfully shows that on the 17th day
of April, 1922, the Court granted the motion of the
defendant to dismiss said action and for judgment
on the pleadings therein and April 24, 1922, signed
its final judgment therein and the same was entered
on the 24th day of April, 1922, against your peti-
tioner.

Your petitioner, feeling himself aggrieved by
said granting of said motion to dismiss and for
judgment for defendant on the pleadings and by
the judgment entered thereon as aforesaid, here-
with petitions the Court for an order allowing him
to prosecute a writ of error to the Circuit Court of
Appeals of the United States for the Ninth Circuit

under the laws of the United States in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at San Francisco, in the State of California, in said circuit for the correction of the errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by plaintiffs [44] in error conditioned as the law directs, and that a transcript of the record, proceedings, and papers upon which said decision and judgment were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated this 23d day of October, 1922.

GEORGE D. AYERS,

Attorney and Counsel for Petitioner in Error.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 23, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [45]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

AT LAW —No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COM-
PANY, a Corporation,

Defendant.

Assignments of Error.

Now comes George E. Miller, plaintiff in the above numbered and entitled cause, and in connection with his petition for a writ of error in this cause assigns the following errors which plaintiff in error avers occurred in the proceedings below and upon which he relies to reverse the judgment entered herein as appears of record:

(1) That the Court erred in granting defendant's motion for an order dismissing the action and for judgment on the pleadings.

(2) That the Court erred in ordering, adjudging and decreeing judgment on the pleadings for the defendant, that the action be dismissed and that the defendant Spokane International Railway Company do have and recover of and from the plaintiff George E. Miller its costs therein.

(3) That the Court erred in finding and ruling in its memorandum decision that the defense of *res adjudicata* was not denied.

(4) That the Court erred in finding and ruling in its memorandum decision that the former judgment in the case of George E. Miller, plaintiff, against Spokane International Railway Company, a corporation, defendant, #3545 in the above-entitled Court was a complete bar to the present action.

(5) That the Court erred in finding and ruling that the injuries complained of in said former and the present action are one and the same. [46]

(6) That the Court erred in finding and ruling in said memorandum decision that the second action or in other words the present action is upon the same claim or demand as said first action #3545.

(7) That the Court erred in finding and ruling in its memorandum decision that the two breaches referred to in said memorandum decision, one being the negligence referred to in the first and the other being the negligence referred to in the second action above referred to, resulted in a single injury.

(8) That the Court erred in finding and ruling in its said memorandum decision that it is immaterial whether the charge of negligence stated and referred to in the complaint of the plaintiff in error in the present action is based upon the rules of the common law or upon a state or federal statute.

(9) That the Court erred in its memorandum decision in its statement "No doubt, as claimed by the plaintiff, the law gives a right of action for each and every breach of a statutory duty, but

where several breaches result in a single injury it gives but one right of action and no more" in that in the statement therein "But where several breaches result in a single injury it gives but one right of action and no more" there is a confusion in the use of the phrase "single injury," the plaintiff in error herein claiming that in the above-entitled action the "injury" complained of is not the same injury as the injury complained of in said former action #3545 although the physical damage resulting from the two different legal injuries or acts of negligence referred to one in the first and the other in the second of the said two actions respectively, may be the same.

(10) That the Court erred in that its said rulings, findings, granting of said motion to dismiss plaintiff's complaint and for judgment on the pleadings and the judgment for the defendant entered in accordance therewith were and are in contravention of the Fourteenth Amendment of the Constitution of the United States, and [47] if not reversed, would take away without due process of law a valuable property right guaranteed the plaintiff by the Constitution of the United States and Articles in Amendment thereof.

WHEREFORE plaintiff in error prays that the judgment of said Court be reversed and the cause remanded for such further proceedings as are required by the principles of law, the statutes in such case as made and provided and the record in this case.

GEORGE T. AYERS,
Attorney and Counsel for Plaintiff in Error.

Filed in the U. S. District Court Eastern District of Washington. Oct. 28, 1922. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [48]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

AT LAW—No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

Writ of Error Bond.

KNOW ALL MEN BY THESE PRESENTS that we, George E. Miller as principal and Fidelity and Deposit Company of Baltimore, Maryland, but doing business in the City and County of Spokane and State of Washington as surety, are held and firmly bound unto Spokane International Railway Company, a corporation in the full and just sum of Three Hundred Dollars (\$400.00) to be paid to the said Spokane International Railway Company, its attorneys, successors, administrators, executors, or assigns, to which payment well and truly to be made we bind ourselves, our successors, assigns, executors and administrators, jointly and severally by these presents.

Signed and dated this the 23d day of October, A. D. 1922.

Whereas at a regular term of the District Court

of the United States for the Eastern District of Washington, Northern Division, sitting at Spokane, Washington, in said District, in a suit pending in said Court between George E. Miller, as plaintiff and Spokane International Railway Company, a corporation as defendant, cause No. 3716, on the law docket of said Court final judgment was rendered against the said George E. Miller dismissing the complaint of said George E. Miller and ordering, adjudging and decreeing that the defendant Spokane International Railway Company, a corporation, do have and recover of and from plaintiff George E. Miller, its costs, and the said George E. Miller, has obtained a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment of the said Court in the aforesaid suit, and a citation directed to the said Spokane International Railway Company, a corporation, defendant in error, citing it to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California, according to law within thirty days (30) from the date hereof.

Now the condition of the above obligation is such that if the said George E. Miller shall prosecute his writ of error to effect and answer all costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

GEORGE E. MILLER. [Seal]

FIDELITY & DEPOSIT COMPANY OF MARYLAND.

By S. M. SMTH,
Its Attorney in Fact.

Attest:

W. L. BERRY,
General Agent.

Approved:

A. G. PAINE,
Clerk.

October 23, 1922. [49]

Filed in the U. S. District Court, Eastern District of Washington, October 23, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [50]

In the District Court of the United States for the
Eastern District of Washington, Northern Division.

AT LAW—No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error.

On this 23d day of October, 1922, came the plaintiff, George E. Miller, and filed herein and presented to the Court its petition praying for the allowance of a writ of error, and filed therewith its assignments of error intended to be urged by it, and that an order be made fixing the amount of security to be given by plaintiffs in error condition as the law

directs, and that a transcript of the record, proceedings and papers upon which said decision and judgment were made, duly authenticated, may be sent to the United States Circuit Court of Appeals, and such other and further proceedings may be had as may be proper in the premises.

In consideration thereof the Court does allow the writ of error and the bond for such writ of error, fixed at the sum of Three Hundred (300) dollars.

FRANK H. RUDKIN,
United States District Judge.

Filed in the United States District Court, Eastern District of Washington. Oct. 28, 1922. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [51]

In the District Court of the United States for the
Eastern District of Washington, Northern Division.

AT LAW—No. 3716.

GEORGE E. MILLER,

Plaintiff in Error,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant in Error.

Writ of Error.

United States of America,—ss.

The President of the United States WARREN G. HARDING to the Honorable Judge of the District Court of the United States for the Eastern District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you between George E. Miller, plaintiff in error, and Spokane International Railway Company, a corporation, defendant in error, a manifest error has happened to the damage of George E. Miller, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco in the State of California, where said Court is sitting, within thirty (30) days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right and accord-

ing to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 23d day of October, A. D. 1922.

ALAN G. PAINE,
Clerk of the United States District Court, Eastern
District of Washington, Northern Division.

Allowed this 23d day of October, A. D. 1922.

FRANK H. RUDKIN,
Judge.

Filed in the United States District Court, Eastern
District of Washington. Oct. 23, 1922. Alan G.
Paine, Clerk. By A. P. Rumburg, Deputy. [52]

In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.

AT LAW—No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COM-
PANY, a Corporation,

Defendant.

Citation.

The President of the United States of America to
Spokane International Railway Company, a
corporation and to Frank D. Allen, Esquire
and Alex M. Winston, Esquire, your attorneys
of record GREETING:

You are hereby cited and admonished to be and
appear at a session of the United States Circuit
Court of Appeals for the Ninth Circuit, to be holden
in the city of San Francisco, in the State of Cali-
fornia, within thirty (30) days from the date of this
citation, pursuant to a writ of error filed in the
office of the Clerk of the District Court of the
United States for the Eastern District of Washing-
ton, Northern Division, wherein George E. Miller is
plaintiff in error, and you, The Spokane Interna-
tional Railway Company are defendant in error, to
show cause if any there be, why the judgment ren-
dered against the plaintiff dismissing its complaint,
and ordering, adjudging and decreeing that the de-
fendant Spokane International Railway Company
do have and recover from the plaintiff George E.
Miller its costs, as in said writ of error mentioned
should not be corrected, and why speedy justice
should not be rendered to the petitioner in that be-
half.

WITNESS the Honorable WILLIAM H. TAFT,
Chief Justice of the Supreme Court of the United
States, this 23d day of October, 1922, and in the

One Hundred and Forty-sixth year of the [53] Independence of the United States.

Attest:

FRANK H. RUDKIN,
United States District Judge.

Copy of above citation received Oct 26, 1922.

ALLEN, WINSTON & ALLEN,
Attorneys for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 23, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [54]

In the District Court of the United States for the
Eastern District of Washington, Northern Division.

AT LAW—No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

Praeipie for Transcript of Record.

Praeipie for transcript on appeal to Alan G. Paine, Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division. Whereas the above-named plaintiff, George E. Miller, on the twenty-third (23) day of October, 1922, petitioned the above-entitled

Court for an order allowing him to present a writ of error to the Circuit Court of Appeals of the United States for the Ninth (9) Circuit and said order allowing said writ of error was made and entered on said twenty-third (23) day of October, 1922, and bond fixed by the Court and said writ of error was duly issued on said date ordering that the record and proceedings aforesaid be sent with this writ to said United States Circuit Court of Appeals for the Ninth (9) Circuit. Now, therefore, in accordance with the rule and practice of the above-entitled Court you are hereby requested in making up the transcript of said record and proceedings to enter in said transcript the following part of the records the same being what the complaint and appeal deem material to the review of the defense of this Court in said Circuit Court of Appeals for the Ninth (9) District, to wit:

1. The original bill of complaint.
2. The summons and return.
3. Defendant's answer.
4. Plaintiff's reply.
5. Motion to dismiss.
6. Motion to amend complaint.
7. Order amending complaint.
8. Amended complaint.
9. Appearance of defendant.
10. Plaintiff's brief on motion to dismiss.
11. Memorandum opinion of Court on motion to dismiss.
12. The order of judgment.
13. The petition for writ of error.

14. Assignments of error.
15. Bond on appeal.
16. Order allowing writ of error on bond. [55]
17. Writ of error.
18. Citation on said writ of error.
19. Praecipe.
20. Motion for extension of time.
21. Order extending time.

You are hereby requested to prepare the above transcript according to the rules and practice of the above-entitled Court.

Dated this 23d day of October, 1922.

GEORGE D. AYERS,
Attorney for Plaintiff.

Filed in the U. S. District Court, Eastern District of Washington. Nov. 2, 1922. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [56]

In the District Court of the United States for the
Eastern District of Washington, Northern Division.

AT LAW—No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

Motion for Extension of Time for Citation.

Comes now the plaintiff and moves that the time for the return of the Citation on the writ of error in the above-entitled cause which was made returnable within thirty (30) days from October 23, 1922, be extended to and including the twenty-second (22) day of December, 1922, for the reason that it will be difficult, if not impossible, to make up the transcript on appeal in season to be filed in the office of the Clerk of the Circuit Court of Appeals in San Francisco within the period allowed for the return of said citation as the return date now stands.

GEORGE D. AYERS,

Attorney and Counsel for Plaintiff.

Filed in the U. S. District Court, Eastern District of Washington. Nov. 17, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [57]

*

In the District Court of the United States for the Eastern District of Washington, Northern Division.

AT LAW—No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY CO.,
Defendant.

**Order Extending Time for Return of Citation to
and Including December 22, 1922.**

Upon consideration of the Motion of the plaintiff
and good cause shown

IT IS ORDERED that the date for the return of
the citation in the above-entitled cause which was
heretofore made returnable within thirty (30) days
from October 23, 1922, is hereby extended to and
including the twenty-second (22) day of December,
1922.

Done in open Court this 17th day of November,
1922.

FRANK H. RUDKIN,
District Court Judge.

Filed in the U. S. District Court, Eastern District
of Washington. Nov. 17, 1922. Alan G. Paine,
Clerk. A. P. Rumburg, Deputy [58]

In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.

No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COM-
PANY, a Corporation,

Defendant.

Certificate of Clerk to Transcript of Record.

United States of America,
Eastern District of Washington,—ss.

I, Alan G. Paine, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing printed pages, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings as called for by the defendant and plaintiff in error in its praecipe therefor, and as the same remain of record and on file in the office of the Clerk of Said District Court, and that the same constitute the record on writ of error from the judgment of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause.

I further certify that the cost of preparing, certifying and printing the foregoing transcript is the sum of Nineteen and 60/100 (\$19.60) Dollars, and that the same has been paid to me by George D. Ayers, attorney and counsel for plaintiff, and plaintiff in [59] error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in said district, this 18th day of December, A. D. 1922.

[Seal]

ALAN G. PAINE,
Clerk. [60]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

AT LAW—No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COM-
PANY, a Corporation,

Defendant.

Citation (Original).

The President of the United States of America to
Spokane International Railway Company, a
corporation, and to Frank D. Allen, Esquire
and Alex M. Winston, Esquire, your attorneys
of record, GREETING:

You are hereby cited and admonished to be and
appear at a session of the United States Circuit
Court of Appeals for the Ninth Circuit, to be holden
in the City of San Francisco, in the State of Cali-
fornia, within thirty (30) days from the date of
this citation, pursuant to a writ of error filed in
the office of the Clerk of the District Court of the
United States for the Eastern District of Washing-
ton, Northern Division, wherein George E. Miller
is plaintiff in error, and you, The Spokane Inter-
national Railway Company, are defendant in error,
to show cause if any there be, why the judgment
rendered against the plaintiff dismissing its com-

plaint, and ordering, adjudging and decreeing that the defendant Spokane International Railway Company do have and recover from the plaintiff George E. Miller its costs, as in said writ of error mentioned should not be corrected, and why speedy justice should not be rendered to the petitioner in that behalf.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 23d day of October, 1922, and in the One Hundred and Forty-sixth year of the Independence of the United States.

Attest:

F. H. RUDKIN,

United States District Judge. [61]

Copy of above citation received Oct. 26, 1922.

ALLEN, WINSTON & ALLEN,

Attys. for Deft.

[Endorsed]: 3716. George E. Miller vs. Spokane International Railway Co. Citation. Filed in the U. S. District Court, Eastern Dist. of Washington. Oct. 23, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [62]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

AT LAW—No. 3716.

GEORGE E. MILLER,

Plaintiff in Error,

vs.

SPOKANE INTERNATIONAL RAILWAY COM-
PANY, a Corporation,

Defendant in Error.

Writ of Error (Original).

United States of America,—ss.

The President of the United States, WARREN G.
HARDING, to the Honorable Judge of the
District Court of the United States for the
Eastern District of Washington, Northern
Division, GREETING:

Because in the record and proceedings, as also
in the rendition of the judgment of a plea which is
in the said District Court before you between
George E. Miller, plaintiff in error, and Spokane
International Railway Company, a corporation, de-
fendant in error, a manifest error has happened to
the damage of George E. Miller, plaintiff in error,
as by said complaint appears, and we being willing
that error, if any hath been, should be corrected,
and full and speedy justice be done to the parties
aforesaid in this behalf do command you if judg-
ment be therein given, that under your seal you

send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco in the State of California, where said Court is sitting, within thirty (30) days from the date hereof (in the said Circuit Court of Appeals to be then and there held), and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done therein to correct the error what of right and according to [63] the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 23d day of October, A. D. 1922.

ALAN G. PAINE,
Clerk of the United States District Court for the
Eastern District of Washington, Northern
Division.

Allowed this the 23 day of October, A. D. 1922.

F. H. RUDKIN,
United States Judge. [64]

[Endorsed]: No. —. George E. Miller vs. Spokane International Railway Co. Writ of Error. Filed in the U. S. District Court Eastern Dist. of Washington. Oct. 23, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [65]

[Endorsed]: No. 3957. United States Circuit Court of Appeals for the Ninth Circuit. George E. Miller, Plaintiff in Error, vs. Spokane International Railway Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division. Filed December 21, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

Case No. 3957.

GEORGE E. MILLER,

Plaintiff in Error,

vs.

SPOKANE INTERNATIONAL RAILWAY COM-
PANY, a Corporation,

Defendant in Error.

The Clerk will enter my appearance as counsel
for defendant in error.

ALEX M. WINSTON,
F. D. ALLEN,

Office Address 1107 Paulsen Bldg., Spokane, Wash-
ington.

Note.—Appearance cannot be entered unless the
counsel signing is a member of the Bar of this

Court, or of the Supreme Court of the United States, or of a District Court within the Ninth Circuit. See Rule 7, C. C. A.

Individual and not firm names must be signed.

[Endorsed]: No. 3957. United States Circuit Court of Appeals for the Ninth Circuit. Praecipe for Entry of Appearance. Filed Dec. 29, 1922. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 3957.

GEORGE E. MILLER

vs.

SPOKANE INTERNATIONAL RAILWAY COM-
PANY, a Corporation.

**Stipulation for Hearing of the Appeal at Seattle,
Washington.**

In accordance with the provisions of Rule 36 of the United States Circuit Court of Appeals for the Ninth Circuit it is hereby stipulated by and between the parties to this action that the writ of error herein shall be heard at the next annual term

of said Circuit Court of Appeals in the City of Seattle in the State of Washington.

GEORGE E. MILLER, Plaintiff, by his Attorney
and Counsel,

GEORGE D. AYERS.

SPOKANE INTERNATIONAL RAILWAY COM-
PANY, Defendant, by its Attorneys and Coun-
sel,

ALEX M. WINSTON,
F. D. ALLEN.

Dated San Francisco, California, January 2, 1923.
So ordered:

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: No. 3957. United States Circuit
Court of Appeals for the Ninth Circuit. Filed
Jan. 2, 1923. F. D. Monekton, Clerk.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GEORGE E. MILLER,
Plaintiff in Error,
vs.

SPOKANE INTERNATIONAL RAILWAY
COMPANY, a Corporation.
Defendant in Error.

BRIEF OF PLAINTIFF
IN ERROR

GEORGE D. AYERS, Ziegler Building, Spokane,
Washington
Attorney for Plaintiff and Plaintiff in Error.
ALLEN, WINSTON & ALLEN, Paulsen Building,
Spokane, Washington.
Attorneys for Defendant, and Defendant in Error.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE E. MILLER,
Plaintiff in Error,

vs.

SPOKANE INTERNATIONAL RAILWAY
COMPANY, a Corporation.
Defendant in Error.

BRIEF OF PLAINTIFF
IN ERROR

GEORGE D. AYERS, Ziegler Building, Spokane,
Washington

Attorney for Plaintiff and Plaintiff in Error.

ALLEN, WINSTON & ALLEN, Paulsen Building,
Spokane, Washington.

Attorneys for Defendant, and Defendant in Error.

STATEMENT OF THE CASE.

This case arises upon Writ of Error to the United States District of the Eastern District of Washington, Northern Division, and as a basis underlying all of the specifications of error involves three primary questions;

1. Whether the Federal Employers Liability Act, the Federal Safety Appliance Act, the Federal Locomotive Boiler Inspection Law and the Rules of the Interstate Commerce Commission in conjunction have established different grounds for civil liability than those formerly existing under the common law action of trespass on the case established under the statute of Westminster II, 13 Edward I, C. 24 in that while on the one hand the old action of negligence in trespass on the case created *only one action of tort* for violation by defendant of its general duty to protect plaintiff from injury, on the other hand the Federal Statutes and the Interstate Commerce Commission Rules in conjunction create not a general duty on the part of the defendant to use care but a specific duty for each rule ordered to be obeyed and a distinct action of tort for each rule violated, when personal damage results to the plaintiff from such violation.

2. Whether, if an action of tort arising out of one violation of these Federal Acts and Interstate Commerce Commission rules is a distinct and separate action of tort from one arising out of another violation of these Acts and rules, it fairly can be called a splitting of the causes of action if two separate torts are

made the basis of two separate actions, even although both torts result in the same damage? It is admitted here that if damages be recovered in the action first brought, only nominal damages could be recovered in the second action; but the question is—if no damages are recovered in the first action, can it fairly be said that it is splitting the cause of action to bring the second action?

3. If it is not a splitting of the cause of action to bring a second action under these circumstances, is the merely practical reason that to permit the second action based upon the separate and distinct tort from that alleged in the first action would encourage a multiplicity of suits (especially in the light of the fact that the two years' statute of limitations practically prevents any numerous multiplicity of suits) valid in the light of the plaintiff's contention that to bar his second cause of action because he brought the first separate and distinct cause of action is a violation of plaintiff's rights guaranteed under the Fourteenth Amendment of the Constitution of the United States?

The plaintiff brought one action against the defendant based upon the alleged violation of the Federal Acts and the Rules of the Interstate Commerce Commission by constructing and permitting to be used upon its locomotive upon which the plaintiff was standing at the time of the accident, a cab apron that was perfectly smooth and not roughened as required by the rules and did not fit smoothly and extended about an inch or inch and one-half above the floor tender, which defects caused the plaintiff to trip and

fall from the locomotive, thus producing the damage to the plaintiff alleged in that cause of action.

See complaint in first cause of action and especially that part thereof quoted on pages 18, 19 and 20 of transcript.

In this first cause of action the jury returned a verdict for the defendant.

For reasons not stated in the transcript in the instant case but, plaintiff submits, properly inferable from the memorandum opinion of the learned judge denying plaintiff's motion for a new trial therein (which opinion is given in full in this brief, pages 40, 41, 42) the plaintiff did not allege or attempt to prove in the first cause of action any violation of the Interstate Commerce Commission's Rule that cab aprons shall be of proper length and width to insure safety, but did allege in his second cause of action brought after judgment for defendant in the first cause of action violations of this rule and of the further rule that "the minimum width of the gangway between locomotive and tender, while standing on straight track, shall be sixteen (16) inches, "and alleged that the cab apron was approximately nine (9) inches too short, thus leaving a hole between the front tender sill and tail piece on the locomotive thirteen (13) inches wide by sixteen (16) inches long; that by reason of this hole there were only approximately eight and one half ($8\frac{1}{2}$) inches in width of standing space at the gangway between the cistern on the tender and said hole at or in the vicinity of the place where plaintiff slipped, thus making an extremely narrow

and dangerous standing place or passage-way between said cistern and said hole; that the plaintiff in the course of his employment was standing on this narrow space, slipped and fell through said hole, thus producing the damage to himself alleged in both causes of action.

See original complaint in second cause of action (trans. pages 5 to 7) and amended complaint (trans. pages 34 to 36).

In the amended complaint all references to defects alleged in the first cause of action were stricken, thus basing the complaint upon violations of the Interstate Commerce Commission's Rules not mentioned in the first cause of action.

The defendant's answer, omitting the parts thereof not referring to matters raised by the writ of error herein by its third further and affirmative answer and defense, alleges in paragraph 7 thereof "that the accident described and set forth in the complaint herein is the same accident described and set forth in the former action * * *". the entire third answer being one raising the defense of *res adjudicata* (see trans. pages 13-14). To the defendant's answer were annexed the summons, complaint and answer in the first cause of action (see trans. pages 15-25).

The plaintiff's reply in the second cause of action admits paragraph 1 of the defendant's third answer and defense except as to the number of the case, which defendant had wrongly given (which however, raises no questions in the present proceeding) admits all the other paragraphs thereof except paragraph 7,

and, as to paragraph 7, alleges "Plaintiff admits that the falling out of the cab and locomotive and the physical injury, pain and suffering, the loss of employment, and the permanent impairment of plaintiff's earning power and ability resulting therefrom are the same as those referred to in plaintiff's former complaint mentioned in defendant's third affirmative defense, but also alleges that the negligence on the part of the defendant and the present cause of action based thereon are not the same as those set forth in his said former complaint, and denies each and every other allegation in said paragraph 7 of defendant's third affirmative defense." (See trans. pages 26-27). The defendant moved for a dismissal of the action on the ground that the former judgment was a bar, that the matter was *res adjudicata* and that plaintiff was estopped to maintain this action. (See trans. pages 28-29). The plaintiff filed a brief on defendant's motion to dismiss (See trans. pages 40-61) which is hereby referred to and made a part of this statement of facts.

The learned Judge granted defendant's motion and this action was dismissed. (See trans. page 62) The Court's action was based upon its memorandum opinion (trans. pages 57-61.) Whereupon plaintiff brought his petition for writ of error herein (trans. pages 63-64) and did all acts and things necessary to bring the matter into the Circuit Court of Appeals.

Thus it is seen that the basic questions involved herein are those three mentioned at the beginning of this statement of facts.

SPECIFICATION OF ERRORS UPON WHICH
PLAINTIFF RELIES.

These are those stated in the assignments of error (trans. pages 65-67) but may be summarized as follows:

I.

In dismissing the action and in ordering and entering judgment for the defendant on the pleadings.

II.

In finding and ruling in its memorandum decision (trans. bottom page 67 and first four lines on 58) as follows:

“The answer interposes the defense of *res adjudicata*, and inasmuch as that defense has not been denied * * *.”

III.

In that the learned Judge in his memorandum decision erroneously said (trans. page 58.) “In a former action * * * to recover for the same injuries,” and and again (same page) “In the second action * * * for the same injuries,” and again (page 59) “although the injuries complained of in both actions are one and the same” and again (bottom page 59) “And inasmuch as the second action here is upon the same

claim or demand as was the first" and again on page 60 "but where several breaches result in a single injury it gives but one right of action and no more."

The error claimed as existing in the above quotations is that the memorandum opinion uses the words "injury" and "injuries" in two different senses, one connoting "accident" and the other connoting "*injuria*" or a violation of legal right. The plaintiff admits that the accident, or damage, is one and the same in both causes of action, but asserts that the *injuria* or violation of plaintiff's right is separate and distinct in each.

In other words plaintiff claims as error that the learned Judge found and ruled that the two breaches referred to in the memorandum decision, that stated in the first and that stated in the second cause of action, resulted in a single injury rather than in a single accident or damage. This distinction between the words "injuries" in the sense of "*injuria*" and "accident" in the sense of damage the plaintiff claims to be of the utmost importance, and that practically all the errors claimed by the plaintiff as having been committed have resulted from a confusion of the meanings of these terms.

IV.

In finding and ruling (trans. 60) that "it is entirely immaterial whether the charge of negligence is based on the rules of the common law or upon a state or federal statute.

V.

In assuming that the language of the Court in *Jenkins vs. Atlantic etc.* (trans. page 60) that "this is an entire claim for a single tort" etc., and of Judge Dunbar (trans. page 61) namely "They should not be allowed to split their causes of action" etc. are applicable to the instant case.

VI.

That the learned Judge's rulings, findings, granting of said motion to dismiss plaintiff's complaint and for judgment on the pleadings and the judgment for the defendant entered in accordance therewith were and are in contravention of the Fourteenth Amendment of the Constitution of the United States, and, if not reversed, would take away without due process of law a valuable property right guaranteed the plaintiff by the Constitution of the United States and articles in Amendment thereof.

ARGUMENT.

Strictly speaking there is but one main question involved in this case;—namely whether the plaintiff is right in his contention that whatever may be the effect of the Federal Employer's Liability Act taken by itself alone, the effect of that Act in combination with the Federal Safety Appliance Act, or the Federal Locomotive Boilers Inspection Act (either singly or together), and their amendments and the

Rules of the Interstate Commerce Commission regarding the inspection and testing of locomotives and tenders and their appurtenances, under such combination is to change the nature of causes of action arising under such combination from what was the case formerly. This will be considered in greater detail later in this brief.

For the present it is enough to say that while under the common law as it has existed since the enactment of the Statute of WESTMINSTER II, 13 Edward I, C. 24, creating the action of Trespass on the Case, the duty of the defendant carrier towards his employee was general, that of affording him proper protection as defined by the well known rules in the law of Master and Servant, under the above combination of federal laws and rules the plaintiff contends that the duty of the defendant carrier was made specific. It was required to use certain safety appliances and to observe certain specific directions concerning the kind, nature, quality, quantity and use of certain specific parts of locomotives, their tenders and appurtenances. The observance of each specific rule was made a specific duty any violation of which resulting in damage to the employee became a specific actionable tort. Violation of each specific rule constituted a new tort, although the different specific torts may have resulted in the same damage to the employee, the only effect of several torts producing the same single damage being that recovery by the employee thus damaged and compensation to him became compensation for all the torts involved, while on the other

hand a denial by any tribunal that one specific duty was violated did not preclude recovery in a case where the violation of another specific duty was alleged and proven.

If plaintiff's position be correct, then each violation of a different specific duty resulting in damage to the plaintiff employee becomes a different specific tort, and it is not therefore necessary to join these different torts in the same action. Nor, under such circumstances, is it a splitting of causes of action to make each specific tort the basis of different, even although successive, actions. Further, if plaintiff's position be correct, and plaintiff therefore has these different specific causes of action is it in accordance with law to deny the plaintiff's right to maintain a new action for a tort different than that which was the basis of a previous unsuccessful action, merely because not to deny plaintiff's right might result in a multiplicity of suits. Plaintiff maintains that to deny him his right under such circumstances is to violate the Fourteenth Amendment to the Constitution of the United States.

II.

Such being plaintiff's position, he has claimed as error the statement of the learned Judge in the District Court (trans. page 58), to the effect that plaintiff had not denied defendant's defence of *res adjudicata*, for the precautionary reason that the language of the District Court might be taken as finding and ruling

that the plaintiff admitted the defence of *res adjudicata* to be true in fact and good in law.

As a matter of fact plaintiff's reply to defendant's defence of *res adjudicata* admits the damages alleged in both actions to be the same, *but denies that the causes of action are the same*, (trans. page 27). If this be understood, the plaintiff has no further objection to the statement above claimed as error.

III.

Plaintiff's specification of error to the District Court's Statement (trans page 60) that "it is entirely immaterial whether the charge of negligence is based on the rules of the common law or upon a state of federal statute" is a denial of the correctness of plaintiff's position on the main question as stated *Supra*. Discussion of this specification therefore will postponed until and included in plaintiff's discussion of the main point of his brief.

The District Court in its memorandum decision quoted with approval the statements of certain authorities as referred to below.

The plaintiff's counsel refers to these quotations now, before taking up in detail the consideration of the main question involved in plaintiff's case, because the quotation with approval by the learned District Judge of these unquestionable authorities seems to plaintiff counsel to beg the question at issue. The statements by these authorities, in general at least, is not controverted by plaintiff. What plaintiff's coun-

sel respectfully submits is, that from his point of view, these statements have have nothing whatever to do with plaintiff's position, except in so far as the assumption that they do controvert plaintiff's position constitutes, plaintiff's counsel respectfully submits, a begging of the entire main question at issue.

The learned Court in its memorandum decision (trans. pages 60 and 61) quotes with approval the language of the court in *Jenkins vs. Atlantic Coast Line R. Co.* 179 Fed. 535,539 as follows: (trans page 60).

"As said by the Court in *Jenkins vs. Atlantic Coast Line R. Co.*, 179 Fed. 535, 539:

"This is an entire claim for a single tort, and all the various items tending to show negligence on the part of the carrier, and all of the elements of damage to her resulting from such negligence must be included in the one action wherein she is entitled to recover such compensation as she may be entitled to for each and all of such items."

"'Experience has disclosed that for the security of rights and the preservation of the repose of society a limit must be imposed upon the facilities for litigation.'"

Also the language of Judge Dunbar in *Sweeny vs. Waterhouse & Co.* 43 Wash. 613,616 as follows: (trans. pages 60 and 61).

"It is hardly worth while to go into a discussion of the doctrine of *res adjudicata* and the cases cited thereon. This Court has, in more recent cases, somewhat modified the doctrine as announced in the earlier cases, where the old rule was laid down that the plea of *res adjudicata* applies not only to points which were raised but to those which might have been raised in the trial of the former action. But no court, we think, has gone so far as to allow a litigant to experiment with a court by trying his case piecemeal. The cause of action which the appellants now urge was available to them at the former trial, the assignments set forth in the complaint having been obtained prior to the commencement of the first action. They should not be allowed to split their causes of action, try their case out on a part of the causes, and if they fail, commence another action setting forth the other causes."

So also the learned Court said: (trans pages 58-60).

"The plaintiff earnestly insists that he has a right of action for each and every breach of a statutory duty and that a judgment against him in an action for one breach is no defense to a second action for another and different breach, although the injuries complained of in both actions are one and the same. To this contention I cannot yield assent, and the decisions in both the state and federal courts are against it.

In *Sayward vs. Thayer*, 9 Wash. 22, Chief Justice Dunbar said:

"The general doctrine is that the plea of *res judicata* applies, except in special cases, not only

to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising a reasonable diligence, might have brought forward at the time."

"To the same effect, see *Cromwell vs County of Sac.*, 94 U. S. 351, and *Board of Commissioners vs Platt*, 79 Fed. 567. The scope of the estoppel is not the same in all cases. Thus, where the second action is between the same parties but upon a different claim or demand, the estoppel is limited to the points in issue and actually determined in the first action. But where the second action is upon the same claim or demand the estoppel extends not only to the points at issue in the first action but to all claims and all defenses that might have been advanced or interposed by the respective parties. This distinction is clearly pointed out in the *Cromwell* case, *supra*. And inasmuch as the second action here is upon the same claim or demand as was the first, the estoppel extends not only to the matters at issue in the former action but to each and every claim of negligence which the plaintiff might advance in support of his right of recovery. No doubt, as claimed by the plaintiff, the law gives a right of action for each and every breach of a statutory duty, but where several breaches result in a single injury it gives but one right of action and no more. And under this rule it is entirely immaterial whether the charge of negligence is based on the rules of the common law or upon a state or federal statute."

None of these cases arose under the Federal Statutes and the Interstate Commerce Commission Rules, which form the basis of the action in the instant case.

The *Jenkins Case* will be considered last as it involves a tort for a railroad accident.

The *Sweeny Case* is an action for non-delivery of a consignment of freight.

The *Sayward Case* was a controversy over logs.

Cromwell vs. County of Sac., and Board of Commissioners vs. Platt both involved questions of municipal bonds.

None of the quotations above stated are objectionable to the plaintiff's position and only one, plaintiff's counsel respectfully submits, has any bearing upon plaintiff's position.

The District Court (trans. page 59), however, says:

"The scope of the estoppel is not the same in all cases. Thus, where the second action is between the same parties but upon a different claim or demand, the estoppel is limited to the points in issue and actually determined in the first action. But where the second action is upon the same claim or demand the estoppel extends not only to the points at issue in the first action but to all claims and all defenses that might have been advanced or interposed by the respective parties. This distinction is clearly pointed out in the *Cromwell case*, *supra*."

To this distinction plaintiff agrees, but disagrees with the statement immediately following (trans. page 59 bottom) that the second action in the instant case is upon the same claim and demand as was the first.

Indeed, in the memorandum decision of the same judge in the former case, in which the Court denied plaintiff's motion for a new trial, the Court said: (See appendix to this brief, pages 40, 41, 42.)

"On the contrary the plaintiff is seeking a new trial for the purpose of presenting to a new jury a new and independent charge of negligence not contained or even referred to in the original complaint" Why is not this statement in agreement with plaintiff's position in the instant case?

"The distinction, often not well noted, between "injuries" as used in the Federal Act and "*injuria*" and the different possible connotations of the word "accident" should be borne in mind most carefully. Otherwise, particular danger exists in the instant case of being misled by the "fallacy of ambiguous middle" or of using the middle term in two different senses in the major and minor premises of the syllogism

Specifically what the plaintiff did admit is shown in paragraph 7 (trans. page 27) of his reply, as follows:

"Plaintiff admits that the falling out of the cab and locomotive and the physical injury, pain and suffering, the loss of employment, and the permanent impairment of plaintiff's earning power and ability resulting therefrom are the same as those referred to in

plaintiff's former complaint mentioned in defendant's third affirmative defence, but also alleges that the negligence on the part of the defendant and the present cause of action based thereon are not the same as those set forth in his said former complaint, and denies each and every other allegation in said paragraph seven of defendant's third affirmative defence."

Assuming for the sake of argument that the case of *Jenkins et al. vs. Atlantic Coal R. Co.*, 179 Fed. 535 correctly states the law in Common Law actions of negligence, paragraph 7 of plaintiff's reply, (trans. page 27) would be an admission (inferentially at least) that both the accident and the "*injuria*" were identical in both the former and the present action of the plaintiff against the defendant, whether the word "accident" was used in the two different senses referred to above or not, IF THESE TWO CASES OF MILLER VS. THE SPOKANE INTERNATIONAL RAILWAY COMPANY HAD BEEN CASES FOUNDED UPON THE COMMON LAW ACTION OF NEGLIGENCE, BUT NOT WHEN IN FACT THESE ACTIONS ARE BROUGHT UNDER THE FEDERAL STATUTE.

In the Jenkins case, the plaintiff had previously brought an action in a South Carolina court against one defendant railroad company for "damages for the same injuries" as set forth in the second complaint against another defendant railroad company; and it was contended by the defendant in the federal court case that privity existed between the defendant railroads in each case and that the judgment for the de-

fendant in the state court was a bar to the action in the federal court.

The question arose in the Circuit Court of the United States for the District of South Carolina on plaintiff's motion to strike from the defendant's answer the defence outlined above. This motion the Court denied.

The Circuit Court of the United States held that privity did exist between the defendants in each of the cases.

Secondly, the Court said that the plaintiff's cause of action was that of a passenger against a carrier IN NOT SAFELY CARRYING HER. NOTE HERE THE GENERAL DUTY OF SAFE CARRIAGE UNDER THE COMMON LAW AS AGAINST THE SPECIFIC DUTY TO DO SPECIFIC THINGS PLACED UPON CARRIER BY THE FEDERAL STATUTE, WHICH WILL BE QUOTED LATER.

The Court showed by the evidence that also the specific acts of negligence in violation of the general duty imposed by the Common Law, shown in the two cases were really identical, as disclosed by the evidence. Hence this was of itself sufficient ground for the Court's decision in the federal case.

But the Court went on and said, page 538 (the capitalization of sentences being ours, whether that

were so or not, a party who had a cause of action growing out of a tort, cannot be permitted to divide the tort, and make it the subject of different suits.

“The plaintiff’s cause of action here is that as a passenger, she had a right to safe carriage. That is her primary right, and there is a corresponding primary duty devolving upon the carrier to safely carry her. It was for this neglect of duty—this delict—resulting, as she alleged in injury to her, that she claims damages against the carrier. THIS IS AN ENTIRE CLAIM FOR A SINGLE TORT, AND ALL THE VARIOUS ITEMS TENDING TO SHOW NEGLIGENCE ON THE PART OF THE CARRIER AND ALL OF THE ELEMENTS OF DAMAGE TO HER RESULTING FROM SUCH NEGLIGENCE MUST BE INCLUDED IN THE ONE ACTION WHEREIN SHE IS ENTITLED TO RECOVER SUCH COMPENSATION AS SHE MAY BE ENTITLED TO FOR EACH AND ALL OF SUCH ITEMS.”

In commenting upon this case, let us note that the Common Law action of Negligence arose as one of the forms of the old action (under the statute of Westminster II, 13 Edward I, C. 24) of Trespass on the Case and that three elements are essential to its existence as an action of negligence;

(1) The existence of a duty on the part of defendant to protect plaintiff from the injury.

(2) Failure of defendant to perform that duty;
and

(3) Injury to plaintiff from such failure of defendant, 29 Cyc. 419 Article Negligence.

When any injury results to the plaintiff from failure of defendant to perform his LEGAL DUTY towards the plaintiff, a cause of action arises.

As was the case under the old statute of Westminster II, so also under the Federal Acts it is true that WHEN ANY INJURY RESULTS TO THE PLAINTIFF FROM FAILURE OF THE DEFENDANT TO PERFORM HIS LEGAL DUTY TOWARDS THE PLAINTIFF A CAUSE OF ACTION ARISES.

Consideration of both these laws, the old common law, based upon the ancient statute, and the modern federal laws, discloses clearly the fact that the test as to the number of actions that can be maintained depends not only upon the question as to the number of injuries (using the word not as connoting "*injuria*" but as connoting physical, mental or pecuniary damage) but UPON THE NUMBER OF LEGAL DUTIES VIOLATED. One right of action exists (under both the ancient and the federal law), for *each legal duty violated regardless* of the number of physical, mental or pecuniary injuries inflicted. The Jenkins case itself is clear upon this point. See *supra*.

The essential difference between the two laws lies in the fact that under the old law based on the ancient statute THE LEGAL DUTY CLEARLY WAS

GENERAL, while, on the other hand, under the modern federal statutes, the LEGAL DUTY CLEARLY IS SPECIFIC.

V.

MAIN POINT OF PLAINTIFF'S CASE.

As previously stated plaintiff's main position is:

(1) That contrary to the Common Law Rule, each violation of the Interstate Commerce Commission Rules under the Locomotive Boilers' Inspection Act, the Federal Safety Appliance Act and the amendments to these acts, and the Federal Employer's Liability Act, when it results in damage to the plaintiff employee, constitutes a tort distinct and separate from each violation of any other rule.

(2) That these distinct and separate torts give rise to separate and distinct causes of action.

(3) That this is true, even in cases in which the distinct and separate torts result in the same damage, the only difference being that compensation for damages recovered in one cause of action necessarily would cover the compensation in all.

(4) That such separate and distinct causes of action may be brought successively for the short time permitted by the Statute of Limitations without breaking the rule against splitting actions or rendering the defence of *res adjudicata* valid and operative.

A

STATEMENT OF FEDERAL LAWS AND
COMMISSION RULES APPLICABLE
TO THE INSTANT CASE.

Under act of April 22, 1908, Ch. 149, 35 Stat. L. 65, Barnes Federal Code, 8069, 8 Fed. Stat. Ann. (2d. ed.) page 1208, Compiled Stats. 8657, constituting part of the Federal Employers' Liability Act, also known as the "Sterling Act," and sometimes styled the "Second Employers' Liability Act" it is enacted (the large type being ours), that "Every common carrier, by railroad, while engaging in commerce between any of the several states or territories * * * or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury or death resulting in whole or in part * * * by reason of ANY DEFECT OR INSUFFICIENCY, due to its negligence in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment."

The right of action according to the words of the act above quoted does not arise out of violation of a general primary duty of the defendant to furnish safe tools, a safe place to work, etc., and a violation of a corresponding general primary right of the plaintiff to have been furnished with safe tools and appliances and a safe place in which to work; but it arises out of a violation of plaintiff's right that there

should not exist any specific defect by reason of which the plaintiff has suffered injury.

The particular rights of the plaintiff and the particular duties of the defendant towards the plaintiff are found in the Federal Locomotive Boiler Inspection Law, so called, as amended March 4, 1915, and in the RULES AND INSTRUCTIONS FOR INSPECTION AND TESTING OF STEAM LOCOMOTIVES AND TENDERS, approved by orders of the Interstate Commerce Commission, dated October 11, 1915, June 30, 1916, November 13, 1916, December 26, 1916, December 17, 1917 and April 7, 1919.

See Act of Feby. 17, 1911, Ch. 103, 36 Stat. (913 et seq. or Locomotive Boiler Inspection Law.)

Act of March 4, 1915, Ch. 169, 38 Stat. L. 1192 or amendment of the above law. (See 8 Fed. Stat. Ann. 2nd. Ed., pages 1200-1206, Barnes Federal Code, Secs. 8046 to 8057, both inclusive, U. S. Compiled Statutes, Sections 8630 to 8629 inclusive and Secs. 8639b and 8639c.) See also Laws, Rules and Instructions of Interstate Commerce Commission referred to above.)

By these various statutes and rules and regulations made by the Interstate Commerce Commission it appears—

(a) By the Locomotive Boiler Inspection Law that it is unlawful for any common carrier engaged in interstate or foreign traffic to use any locomotive engine

propelled by steam power unless its boiler and appurtenances are in a proper condition safe to operate:

(b) By the amendment above referred to (approved March 4, 1915,) the Locomotive Boiler Inspection Law is made to apply to and include the entire locomotive and tender and all parts and appurtenances thereof;

(c) By section 5 of the original act (the Boiler Locomotive Inspection Law) which by the amendment referred to in (b) is made to apply to the entire locomotive and tender and all parts and appurtenances thereof, each carrier subject to this act, is required to file rules and instructions for inspection with the chief inspector appointed under Section 3 of the Act by the President of the United States, and these rules and instructions subject to such modifications as the Interstate Commerce Commission requires, shall become obligatory upon the carrier. If the carrier fails to file the rules and instructions, the chief inspector is required to prepare such, which after approval by the Interstate Commerce Commission, shall be obligatory upon the carrier, and a violation of such by the carrier is made unlawful and is subject to punishment under the Act;

(d) That the Chief Inspector also is required under Section 5 of the original Act to make all needful rules, regulations and instructions for the conduct of his office and for the government of the district inspector required under the Act;

(e) That June 2, 1911, the Interstate Commerce Commission after noncompliance by many carriers

with the directions to make rules and instructions, and on the request of all the carriers who had made such rules and instructions prepared new rules and instructions for all carriers under the Act;

(f) That thereafter these rules, regulations and instructions were modified and added to by the Interstate Commerce Commission from time to time applying to the locomotives, tenders and all of their parts and appurtenances;

(g) That among the rules and instructions in accordance with the amendment of March 4, 1915, to the Locomotive Boiler Inspection Act, approved by orders of the Interstate Commerce Commission see page 54 of Laws, Rules and Instructions for Inspection, and Testing of Steam Locomotives and Tenders is rule 117 as follows:

“117 cab aprons—Cab aprons shall be of proper length and width to insure safety, * * *

Also among said rules (see page 66) is the following:

“152 * * * (c) The minimum width of the gangway between locomotive and tender, while standing on straight track shall be 16 inches”;

(h) That under Section 9 of the Locomotive Boiler Inspection Act “any common carrier violating this act or any rule or regulation made under its provisions * * * shall be liable to a penalty of one hundred dollars for each and every such violation, to be

recovered in a suit or suits to be brought by the United States Attorney having jurisdiction in the locality" etc.

B

It is therefore respectfully submitted under the above quoted and referred to rules, regulations and instructions;

1 That the defendant in the instant case is liable to the plaintiff, not for the violation of a general duty to provide him with safe tools and appliances and a reasonably safe place in which to work, but for *injury resulting from any defect specifically forbidden by the Rules.*

2. THAT THE DEFENDANT IS LIABLE TO THE PLAINTIFF FOR ANY INJURY RESULTING FROM THE SPECIFIC ACT OF NEGLIGENCE ARISING FROM ITS VIOLATION OF ANY PART OF RULE 117 OR OF RULE 152-C OF THE LAWS, RULES AND INSTRUCTIONS ABOVE QUOTED.

3. THAT THE RULE IN THE JENKINS CASE CITED BY THE LEARNED COUNSEL FOR THE DEFENDANT DOES NOT APPLY TO THE INSTANT CASE.

The United States Supreme Court has said on the question of negligence, "IT IS OF COURSE SETTLED THAT IF THE EQUIPMENT WAS IN FACT DEFECTIVE OR OUT OF REPAIR, THE QUESTION WHETHER THIS

WAS ATTRIBUTABLE TO THE COMPANY'S NEGLIGENCE IS IMMATERIAL." *Spokane etc. R. Co. vs. Campbell*, 241 U. S. 497, S. C. 683 60 U. S. (L. Ed.) 1125 at 1134. *United States vs. Oregon-Washington R. & N. Co.*, 6, 213 Fed. 689 at 690 per Judge Rudkin.

A VIOLATION OF THE SAFETY APPLIANCE ACT IS NEGLIGENCE PER SE.

Lemme vs. Texas etc. Ry. Co., 141 L. A. 769 75 *sc.* 676.

See, also, Judge Rudkin's statement in *Campbell vs. Spokane & Inland Empire R. Co.*, 188 Federal 516, pp. 517, 518, "When a statute is designed to protect a particular class of persons against a particular class of injuries, a violation of the statutory duty constitutes negligence *per se* whenever one of the protected class is injured from a cause against which the statute was designed to protect him." A good illustration of the fact that the rights granted and duties imposed by the Federal Acts under discussion are SPECIFIC and not general is illustrated in the remarks of Bullington, Circuit Judge, in *U. S. vs. Erie R. Co.*, 212 Fed. 853. "These duties of air-brake equipment and air-brake use are separate and distinct," etc. See, also, *U. S. vs. Pere Marquette Co.*, 211 Fed. 221;

Louisville & N. R. Co. vs. Layton, 243 U. S. 617, 37 Sup. Ct. 465, 61 L. Ed. 931, at 933;

St. Joseph & Grand Island Railway Co. vs. Moore, 243 U. S. 311, 37 Sup. Ct. Ref. 278, 61 L. Ed 741 at 745, 746.

The conclusion seems unavoidable.

(a) That the rules requiring cab aprons to be of proper length and width to insure safety and the minimum width of the gangway between locomotive and tender, while standing on straight track to be 16 inches, are specific rules under the safety appliance and locomotive boiler inspection acts designed to protect a particular class of persons, namely locomotive engineers and firemen, against a particular class of injuries.

(b) The violation of this specific duty is negligence *per se* and

(c) That therefore a specific right of action exists on the part of the plaintiff against the defendant in the instant case for the specific acts of negligence mentioned in the complaint.

Furthermore the violation of the rules referred to above constitute penal offenses under Section 9 of the Locomotive Boiler Inspection Law. See *supra*.

It is plain under the words of section 9 that the defendant carrier is liable to the imposition of the penalty for each rule or regulation violated.

D

Such being the case, a civil liability in favor of the person injured exists as well as the penal liability.

E

When the protection imposed by the Statute for violation of which the penalty is imposed is for the benefit of a class or individual of a class an individual right of action accrues to the party injured.

I. C. J. (Article Actions) 957 and note 30;

Harrod vs. Latham Mercantile and Commercial Co., 77 Kan. 466, 99 Pac. 10;

Berdos vs. Tremont and Suffolk Mills, 209 Mass. 489, 95 N. E. 876;

The Union Pacific Railway Company vs. McDonald, 152 U. S. 262, 14 Supt. Ct. 619, 38 L. Ed. 434, 443.

San Antonio vs. A. P. R. Co. vs. Wagner 241 U. S. 476, 36 Sup. Ct. 626, 60 L. Ed. 1110. In this last-mentioned case, the Supreme Court distinctly says, Page (L. Ed.) 1117 THAT A DISREGARD OF THE COMMAND OF THE SAFETY APPLIANCE ACT "IS A WRONGFUL ACT, AND WHERE IT RESULTS IN DAMAGE to one of the class for whose special benefit the Statute was enacted, the right to recover the damages is implied." "If this act is violated, the question of negligence in the general sense of want of care is immaterial, 241 U. S. 43, and cases cited. But the two Statutes are *in pari materia*, and where the Employer's Liability Act refers to "any defect or insufficiency, DUE TO ITS NEGLIGENCE, in the cars, engines, ap-

pliances" etc., it is clearly the legislative intent to treat a violation of the Safety Appliance Act as 'negligence'—what is sometimes called negligence *per se*."

The caps above were ours.

Mr. Justice Moody, St. Louis, I. M. & S. Ry Co. vs. Taylor, 210 U. S. 281, 52 L. Ed. 1061 emphasizes the point that the duty imposed by the safety appliance acts is SPECIFIC, and that the violation of each specific duty, when resulting in injury, is actionable. On page 1067 he says "We need not enter into the wilderness of cases upon the common law duty of the employer to use reasonable care to furnish his employee reasonably safe tools, machinery and appliances, or consider when and how far that duty may be performed * * * In the case before us, the liability of the defendant does not grow out of the common law of master and servant. The Congress, not satisfied with the Common Law duty, and its resulting liability, has prescribed and defined the duty by Statute * * * The obvious purpose of the legislature was to supplant the qualified duty of the Common Law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured thereby." Can anything be more plain?

F

IN ORDER THAT THE RULE OF *RES ADJUDICATA* OR THE RULE AGAINST SPLITTING OF ACTIONS SHALL APPLY, THE SECOND ACTION MUST REFER TO A LEGAL DUTY, THE VIOLATION OF WHICH WAS THE BASIS OF THE FIRST ACTION. THIS WAS NOT THE CASE HERE, FOR REASONS ABOVE GIVEN.

G.

BEFORE THE RULE OF *RES ADJUDICATA* OR THE RULE AGAINST SPLITTING OF ACTIONS CAN APPLY, THERE MUST BE IN THE TWO ACTIONS TO WHICH THE RULES ARE SOUGHT TO BE APPLIED IDENTITY (1) OF SUBJECT MATTER, (2) OF CAUSE OF ACTION, (3) OF PARTIES AND (4) OF QUALITY OF PERSONS.

Eteburn vs. Neary, 186 Pac. 457;

Privett vs. U. S. 261 Fed. 351;

Hoffmeier vs. Trost, 85 Atl. (N. J. 221.

H.

A proper test to apply in determining this question is to ascertain whether the same evidence which is necessary to sustain the second action would have been sufficient to authorize a recovery in the first.

Hoffmeier et al. vs. Trost (supra).

Sarson vs. Maccia 108 Atl. 109.

It is plain that applying this test judgment in the first Miller action is not a bar to the second, and that the rule against splitting actions is not violated in bringing the second suit.

I.

If full recovery of damages had been had on judgment for plaintiff following a verdict in his favor in the first suit, doubtless recovery could not have been had in the second suit, not because the legal duty violated was the same in each suit (for plainly it was not) but because the injuries were the same, and the plaintiff having been compensated once, he could not be compensated a second time.

Besides, the fact that two distinct acts of negligence result in the same injuries is no bar to an action based on one of them.

See remarks of District Judge Shiras in *Voelker vs. Chicago M. & St. P. Ry. Co.*, 116 Fed. 867 at 875.

J.

The objection that under the rule for which plaintiff contends, a defendant could be vexed with continual and numerous lawsuits, we respectfully submit, is not a valid objection in the instant case,

(1) Because the short period of the Statute of Limitations (2 yrs.) practically negatives the idea of continual vexation.

(2) Because the plain words of the Statutes are not to be disregarded (see Mr. Justice Moody's remarks on that point in *St. Louis M. & S. Ry. Co. vs. Taylor*, *supra*, 52 L. Ed., at page 1068), page 32 this brief and

(3) Because the essential purpose of the Acts is the protection of lives and limbs of employees and passengers and railroads are required strictly to comply with its provisions.

VI.

VIOLATION OF FOURTEENTH AMENDMENT TO CONSTITUTION OF THE UNITED STATES.

A.

Counsel for the plaintiff respectfully submits upon the above cited authority and reasoning:

That each violation of each rule of the Interstate Commerce Commission under the Locomotive Boiler Inspection Act is a specific violation of plaintiff's rights under the Federal Acts and Rules discussed in this brief.

2. That therefore, the violations of these rules alleged in the instant case being different violations of

different rules than those alleged in the first cause of action, it results necessarily that the cause of action in the instant case is distinctly different from the cause of action in the first case.

3. That therefore the plaintiff did not violate the rule against splitting actions in bringing the second case.

4. That therefore the second cause of action is a valuable property right, a chose in action, belonging to the plaintiff.

Williams vs. Atlantic Coast Line R. Co. 69
S. E. 402.

B.

The plaintiff then having this property right, conferred upon him by the Federal Acts and Rules discussed in this brief, and not yet having had "his day in court" for the purpose of enforcing it, the defendant now proposes that plaintiff shall not have any day in court in order to enforce this right (although action on the same was begun within the two year period of limitation) merely because the plaintiff failed to recover judgment against the defendant on an entirely different cause of action. No statute has taken away the plaintiff's right; the rule against splitting actions cannot apply; the action never has been brought before, and the matter never yet has been adjudicated.

Counsel for plaintiff respectfully submits that to deprive plaintiff of this right before adjudication is depriving plaintiff of his property without 'due process of law

As was said by Mr. Justice Mathews in *Pritchard vs. Norton* 106 U. S. 104, 27 L. Ed. 105 at page 107:

"Hence it is that a vested right of action is property in the same sense in which tangible things are property and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law it is not competent for the Legislature to take it away."

If the Legislature cannot take it away, certainly no court can do so rightfully.

In *Williams vs. Atlantic Coast Line R. Co.*, 69 S. E. 402, at page 403 the Supreme Court of North Carolina, speaking through Mr. Justice Manning quotes with approval Wade on Retroactive Laws as follows:

"Thus, where an act of negligence produced a personal injury, for which the person suffering the same was entitled by the existing law to recover the full amount proved, it was held that a subsequent statute limiting the recovery to a less sum would not affect the rights of the injured party. He had a vested right, not only

to compensation for his injuries, but to the measure of damages fixed by the law when the action accrued."

Again on page 403, the Court points out the distinction between rights of action otherwise existing and those created by Statute, as in the instant case, and says that when a right of action has been created by statute and action begun thereunder, that such right cannot be taken away even by repealing the statute, unless by express terms.

It must not be forgotten that the Federal Statutes and Rules of the Interstate Commerce Commission in effect say (1) that the defendant violated plaintiff's right when it made the gangway, upon which the plaintiff slipped, too narrow a space upon which to stand, (2) that it again violated plaintiff's right when it made its cab apron too short, thus leaving a wide and dangerous hole through which the plaintiff, after slipping fell to his great damage. (3) that by virtue of these distinct torts the plaintiff has his rights of action.

These rights of action never have been enforced.

How can any Court rightfully take away what Acts of Congress have given?

If there is anything wrong with these Statutes and Rules (which plaintiff denies) let them be changed by the properly constituted authorities, but not by the Courts.

Wherefore plaintiff respectfully prays that the error of the District Court in granting the motion of the defendant for judgment for defendant on the pleadings and dismissal of the action be corrected.

by his Attorney,

GEORGE D. AYERS,

Ziegler Building,

Spokane, Washington.

APPENDIX.

Certified copy of Judge Rudkin's opinion in the first action of Miller vs. Spokane International Railway Company denying motion for new trial. It is this action upon which the answer of *res adjudicata* in the instant case is based. The italics below are ours.

GEORGE E. MILLER,

Plaintiff,

vs.

S P O K A N E I N T E R N A -
T I O N A L R A I L W A Y , a
corporation,

Defendant.

No. 3545

MEMORANDUM

George D. Ayers, *Attorney for the Plaintiff.*

Allen, Winston & Allen, *Attorneys for the Defendant.*

Rudkin, District Judge. This was an action to recover damages for personal injuries. At the time of receiving the injuries complained of the plaintiff was a locomotive engineer in the employ of the defendant. The negligence charged in the complaint was twofold. First, because the cab apron was not roughened or other provisions made to afford a secure footing as required by the regulations of the Interstate Com-

merce Commission, and second, because the apron extended upwards from the floor of the tender a distance of from one to one and one-half inches. These allegations of the complaint were controverted by answer and the trial resulted in a verdict and judgment for the defendant. The plaintiff has interposed a motion for a new trial based upon what is styled newly discovered evidence or facts. The motion is not based upon error committed during the trial nor upon the discovery of any new testimony material to the issues made by the original pleadings. *On the contrary the plaintiff is seeking a new trial for the purpose of presenting to a new jury a new and independent charge of negligence not contained or even referred to in the original complaint.* To this extent the situation is a novel one, to say the least. The new charge of negligence is in substance that the cab apron was not of proper length and width to insure safety as required by the regulations of the Interstate Commerce Commission. It is admitted that this fact, if it is a fact, was fully known to the plaintiff at and prior to the time of the former trial. Indeed, the chief issue upon that trial was whether a certain cab apron exhibited to the jury was the cab apron in use at the time of the injury. If it was, no issue was made as to its safety or sufficiency, and the jury found that issue against the plaintiff. Some point seems to be made, inferentially at least, of the fact that the cab apron in use at the time of the injury had passed inspection by the inspectors of the Interstate Commerce Commission prior to the injury but since that time the inspectors, or other and different inspectors, have changed their views

and condemned the apron as unsafe and insufficient. And in this connection my attention is directed to a decision of the Supreme Court of this state holding that a party who failed to offer testimony at the trial which was inadmissible under the then rulings of the Supreme Court was entitled to a new trial on the ground of surprise after the Supreme Court had overruled its former decisions and held the testimony admissible. If the inspection or the result of the inspection by the inspectors of the Interstate Commerce Commission stood upon the same footing as a decision of the Supreme Court of the state the plaintiff might or might not be entitled to a new trial here. But the inspection or lack of inspection had nothing whatever to do with the former trial. The decision or conclusion of the inspectors as to the safety or sufficiency of the cab apron was not competent evidence at the trial for or against either party. In fact the case was prosecuted in defiance of, rather than in reliance upon, the result of any inspection theretofore made. If a new trial is to be granted in a case like this, with a change of attorneys and a change of issues, litigation will never end, and this is especially true where the additional facts were known to the complaining party at the time of the former trial.

The motion for a new trial is therefore denied.

UNITED STATES OF AMERICA
EASTERN DISTRICT OF WASHINGTON } ss

I, Alan G. Paine, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that I have compared the foregoing copy with the original MEMORANDUM in Cause No. 3545 George E. Miller vs. Spokane International Railway Company, a corporation, in the foregoing entitled cause, now on file and of record in my office at Spokane, and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said Court this 29th day of Augst, 1923.

ALAN G. PAINE, Clerk.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE E. MILLER,
Plaintiff in Error,

vs.

SPOKANE INTERNATIONAL RAILWAY
COMPANY, a Corporation,
Defendant in Error.

Defendant

BRIEF OF PLAINTIFF
IN ERROR

ALEX M. WINSTON,
F. D. ALLEN,
Attorneys for Defendant in Error.

Paulsen Bldg.,
Spokane, Washington,



United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE E. MILLER,
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vs.

SPOKANE INTERNATIONAL RAILWAY
COMPANY, a Corporation,
Defendant in Error.

BRIEF OF PLAINTIFF
IN ERROR

ALEX M. WINSTON,
F. D. ALLEN,
Attorneys for Defendant in Error.
Paulsen Bldg.,
Spokane, Washington.

STATEMENT OF THE CASE

In January, 1921, plaintiff in error, hereinafter called the "plaintiff," instituted an action in the District Court of the United States for the Eastern District of Washington, Northern Division, against the defendant in error, hereinafter called the "defendant." According to the complaint filed therein, on July 28, 1919, the plaintiff was an engineer in the employment of the defendant in interstate commerce. While his engine was standing upon the line, he stepped upon the apron between the locomotive and tender and slipped and fell from the engine, sustaining serious injuries. As grounds of negligence, he alleged a violation of Section 117 of the Regulations of the Interstate Commerce Commission under the Boiler Inspection Act, as amended to include locomotives, said section being as follows:

"Cab aprons.—Cab aprons shall be of proper length and width to insure safety. Aprons must be securely hinged, maintained in a safe and suitable condition for service, and roughened, or other provision made, to afford secure footing."

He further alleges that the apron was not constructed so as to fit smoothly nor was it on a level with the floor of the tender, as a result of which it extended upward about an inch or an inch and a half therefrom, and that at the time of the accident the plaintiff caught his foot in said apron which caused him to slip upon the apron. He further alleges that said apron was not roughened or otherwise made to afford

secure footing. (Tr. 17-23). This action proceeded to trial, and, as a result thereof, a verdict in favor of the defendant, upon which verdict, judgment was duly entered. (Tr. 14). Thereafter the present action was instituted, in which action a complaint was filed, plaintiff in the meantime having changed counsel, in which complaint it was alleged:

First: That a part of said apron had not been roughened.

Secondly: That it was approximately nine inches too short at each end, to insure safety; and

Thirdly: That by reason of said shortage, there was a hole between the tender and the locomotive through which plaintiff slipped. (Tr. 5). Therefore an amended complaint was by leave of court filed, in which amended complaint the allegation of the smoothness of the apron was omitted and the defendant was alleged to have been negligent in violating said Section 117 of the Regulations of the Interstate Commerce Commission, in that apron was approximately nine inches too short and in that Rule 152-C of the Commission which is as follows:

(c) "The minimum width of the gangway between locomotive and tender, while standing on straight track, shall be sixteen (16) inches." was violated, in that the minimum width of the gangway was less than sixteen inches.

Defendant answered this amended complaint setting forth the pendency and result of the first action. (Tr. 11-14).

To this answer defendant replied admitting that the accident referred to in the amended complaint was the same accident set forth in the complaint in the first action commenced by plaintiff against defendant. (Tr. 26).

Thereupon defendant moved for judgment on the pleadings (Tr. 28). This motion being granted (Tr. 61) the present appeal is prosecuted.

ARGUMENT

But one question is presented by this appeal, to-wit:

Where an employee of a railway company has been injured while in its service and brings an action against it to recover damages for alleged negligence, must such employee specify in his complaint all the grounds of negligence of his employer whether statutory or common law, or be deemed to have waived them? The question may be put another way. Where a number of grounds of alleged negligence on the part of a railway company exist, may an employee institute suit upon one ground and failing to recover upon that ground select another and so continue until a jury has rendered a verdict in his favor?

We have examined with great care the brief of plaintiff in error and with due regard to the standing of counsel, we must confess our inability to comprehend his theory. The law upon the question is so plain that it would seem that no argument or citation of authority is necessary to sustain the judgment of the learned Judge of the lower court. The doctrine of *res adjudicata*, of which the rule against splitting of causes of

action is a part, seems to be conclusive against the contention of the plaintiff. In the case at bar, it appears that violations are alleged of two sections of the rules of the Interstate Commerce Commission. If the present action may be maintained, then what is the logical result? Upon the occurrence of the accident in question, plaintiff might have brought an action alleging the negligence of the carrier to be that the apron was not of proper length to insure safety. Failing in this action, he might bring a second action alleging that the apron was not a proper width to insure safety. Failing in this, a third action that the apron was not securely hinged. Failing in this, a fourth, that the apron was not roughened. Failing in this, a fifth, that the minimum width of the gangway was not 16 inches. Failing in this, a sixth common-law action that the apron stood above the level of the tender. And failing in this, a seventh, that the accident would not have occurred, had the defendant placed a hand hold in the proper place upon the tender or locomotive. The case would be analagous to one where a pedestrian was struck by an automobile, in a state where, under the statute, a violation of any of the laws regulating the operation and management of a motor vehicle would entitle a person injured to recover damages for his injuries from such operator. We can conceive of a case where an injury might be caused by one or all of the following acts of negligence, each being a violation of a provision of the statute.

- (a) Reckless driving;
- (b) Driving faster than the statutory rate;

- (c) Failing to blow a horn;
 - (d) Failing to have lights on the automobile;
 - (e) Defective brakes.
 - (f) Failure to keep to the right of the road;
- and so on ad infinitum.

It seems to us that it is unnecessary to go further. The true rule applicable to the question here presented is so well set forth in the opinion filed in the lower court, that we cite the same verbatim.

RUDKIN, District Judge. This is an action to recover damages for personal injuries. The answer interposes the defense of *res adjudicata*, and inasmuch as that defense has not been denied the defendant has moved for judgment on the pleadings. One of the regulations of the Interstate Commerce Commission regarding cab aprons is as follows:

“Cab aprons shall be of proper length and width to insure safety. Aprons must be securely hinged, maintained in a safe and suitable condition for service, and roughened, or other provision made, to afford secure footing.”

In a former action prosecuted by the same plaintiff to recover for the same injuries the neglect charged in the complaint was two-fold. First, because the cab apron was not roughened or other provision made to afford a secure footing as required by the regulations of the Interstate Commerce Commission; and second, because the apron extended upwards from the floor of the tender a distance of from one to one and one half inches. Upon a trial of that action there was a verdict and judgment for the defendant.

In the second action to recover damages for the same wrong and for the same injuries a recovery is sought on the ground that the cab apron was not of proper length and width to insure safety. Upon the argument I was of opinion that the former judgment was a complete bar, and an examination of the authorities only tends to confirm me in that opinion. The plaintiff earnestly insists that he has a right of action for each and every breach of a statutory duty and that a judgment against him in an action for one breach is no defense to a second action for another and different breach, although the injuries complained of in both actions are one and the same. To this contention I cannot yield assent, and the decisions in both the state and federal courts are against it.

In Sayward vs. Thayer, 9 Wash. 22, Chief Justice Dunbar said:

“The general doctrine is that the plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

To the same effect, see Cromwell vs. County of Sac, 94 U. S. 351, and Board of Com'rs. vs. Platt, 79 Fed. 567. The scope of the estoppel is not the same in all cases. Thus, where the second action is between the same parties but upon a different claim or demand, the estoppel is limited to the points in issue and actually determined in the first action. But where the second action is upon the same claim or demand the estoppel

extends not only to the points at issue in the first action but to all claims and all defenses that might have been advanced or interposed by the respective parties. This distinction is clearly pointed out in the Cromwell case, *supra*. And inasmuch as the second action here is upon the same claim or demand as was the first, the estoppel extends not only to the matters at issue in the former action but to each and every claim of negligence which the plaintiff might advance in support of his right of recovery. No doubt, as claimed by the plaintiff, the law gives a right of action for each and every breach of a statutory duty, but where several breaches result in a single injury it gives but one right of action and no more. And under this rule it is entirely immaterial whether the charge of negligence is based on the rules of the common law or upon a state or federal statute. As said by the Court in Jenkins vs. Atlantic Coast Line R. Co., 179 Fed. 535, 539:

"This is an entire claim for a single tort, and all the various items tending to show negligence on the part of the carrier, and all of the elements of damage to her resulting from such negligence must be included in the one action wherein she is entitled to recover such compensation as she may be entitled to for each and all of such items."

"Experience has disclosed that for the security of rights and the preservation of the repose of society a limit must be imposed upon the facilities for litigation."

Or, as said by Judge Dunbar in Sweeney vs. Waterhouse & Co., 43 Wash. 613, 616:

"It is hardly worth while to go into a discussion of the doctrine of *res adjudicata* and the cases cited thereon. This court has, in more recent cases, some-

what modified the doctrine as announced in the earlier cases, where the old rule was laid down that the plea of *res adjudicata* applies not only to points which were raised, but to those which might have been raised in the trial of the former action. But no court, we think, has gone so far as to allow a litigant to experiment with a court by trying his case piecemeal. The cause of action which the appellants now urge was available to them at the former trial, the assignments set forth in the complaint having been obtained prior to the commencement of the first action. They should not be allowed to split their causes of action, try their case out on a part of the causes and, if they fail, commence another action setting forth the other causes."

The motion for judgment on the pleadings is therefore granted, and the action is dismissed.

It is said that: "Good wine needs no bush," and we therefore desire only to add to the foregoing opinion a comment upon the case of *Jenkins vs. Atlantic Coast Line Railroad Company*, 179 Fed. 535, cited in the opinion. That case was one where a passenger instituted an action against a carrier and alleged in her complaint in addition to other grounds of negligence, that the train upon which she was riding was driven at a dangerous rate of speed. This action was brought in the state court. After a verdict for the defendant judgment was rendered thereon. The second action was then instituted in the Federal Court alleging the former and other grounds of negligence. The Judge of the Federal Court properly held that the second action was barred by the first.

The *Jenkins* case is a well considered one and we invite the court's careful consideration to it. It is well

worth reading for the reason that although it is said that "There is nothing new under the sun," a most careful reading by the writer of this brief of all the cases, has disclosed the fact that the Jenkins case was unique until the ingenuity of the present counsel for the plaintiff was put into operation.

The case next nearest in fact and in principle to the case at bar is that of Gilligan vs. The Sun etc. Association, 54 N. Y. Sup. 471. There the plaintiff sued for an alleged libel, it appearing that an article containing three distinct libellous charges had been printed in the defendant's paper. Action was brought to recover on the ground of the alleged falsity of one of the three charges. A verdict for six cents damages was had and paid. Thereupon the plaintiff instituted a second action to recover damages for the libel contained in the other two charges and for a republication of the article in a subsequent edition. It was held that the second action could not be maintained; that the first action was res adjudicata and that the causes of action could not be split. The question presented in the case at bar being in our opinion, too plain for extended argument, we forbear to discuss it further. The judgment of the lower court should be affirmed.

Respectfully submitted,

ALEX M. WINSTON,

F. D. ALLEN,

Spokane, Washington.

Attorneys for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALBERT C. MORRISON and V. E. LARDI,
Plaintiffs in Error,
vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
First Division.

FILED

MAY 29 1922

F. D. MONCKTON,
CLERK,

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALBERT C. MORRISON and V. E. LARDI,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

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In the Southern Division of the District Court of
the United States in and for the Northern District
of California, First Division.

No. 9720.

UNITED STATES OF AMERICA,

Plaintiff and Defendant in Error,

vs.

ALBERT C. MORRISON and V. E. LARDI,

Defendants and Plaintiffs in Error.

**Praeipie for Transcript of Record on Writ of
Error.**

To the Clerk of said Court:

Sir: Please prepare certified transcript on writ
of error of the following pleadings, papers and
orders:

1st. Indictment.

2d. Verdict of jury.

3d. Motion in arrest of judgment.

4th. Motion for new trial.

- 5th. Sentence and judgment.
- 6th. All stipulations and orders on file extending time to prepare and have settled bill of exceptions.
- 7th. Bill of exceptions as settled by trial Judge.
- 8th. Petition for writ of error.
- 9th. Order allowing writ of error.
- 10th. Assignment of errors.
- 11th. Bond of costs.
- 12th. Writ of error. [1*]
- 13th. Citation on writ of error.
- 14th. Praeceptum for certified transcript.
- 15th. Orders enlarging return day writ of error.

Dated: March 1, 1922.

BERT SCHLESINGER,
C. W. DURBROW,

Attorneys for Defendants and Plaintiffs in Error.

[Endorsed]: Filed Mar. 1, 1922. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [2]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERT C. MORRISON, V. E. LARDI, RICHARD BUCKING, and JOHN ANTONETTI,
Defendants.

*Page-number appearing at foot of page of original certified Transcript of Record.

Information.

At the July term of said Court in the year of our Lord one thousand nine hundred and twenty-one.

BE IT REMEMBERED, that Frank M. Silva, United States Attorney for the Northern District of California, by and through Ben F. Geis, Assistant United States Attorney, who for the United States in its behalf prosecutes in his own proper person, comes into court on this, the 3d day of August, 1921, and with leave of the said Court first having been had and obtained, gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath, and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof;

NOW, THEREFORE, your informant presents:
THAT

ALBERT C. MORRISON, V. E. LARDI, RICHARD BUCKING and JOHN ANTONETTI
hereinafter called the defendants, heretofore, to wit, on or about the [3] 30th day of July, 1921, at and in "Techau Tavern," 247 Powell Street in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully

and unlawfully maintain a common nuisance in that the said defendant did then and there wilfully and unlawfully keep on the premises situated at and in "Techau Tavern" 247 Powell Street, City and County of San Francisco, aforesaid, certain intoxicating liquor, to wit: gin, whiskey, port wine, and red wine, all of said intoxicating liquors, then and there containing one-half of one per cent or more of alcohol by volume, which was then and there fit for use for beverage purposes.

That the keeping of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [4]

SECOND COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof,

NOW, THEREFORE, your informant presents:
THAT

ALBERT C. MORRISON, V. E. LARDI, RICHARD BUCKING and JOHN ANTONETTI

hereinafter called the defendants, heretofore, to wit, on or about the 30th day of July, 1921, at and in "Techau Tavern," 247 Powell Street, in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully possess certain intoxicating liquor, to wit, gin, 1 pint bottle of port wine, one quart bottle of red wine, about two quarts of whiskey, one quart bottle containing whiskey and one quart bottle containing alcoholic liquor, the name of which is to informant unknown, all of said intoxicating liquors, then and there containing one-half of one per cent or more of alcohol by volume, which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28th, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [5]

THIRD COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each

of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents:
THAT

ALBERT C. MORRISON, V. E. LARDI, RICHARD BUCKING and JOHN ANTONETTI hereinafter called the defendants, heretofore, to wit, on or about the 29th day of July, 1921, at and in "Techau Tavern," 247 Powell Street, in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully sell certain intoxicating liquor, to wit: two gin cocktails, two loganberry highballs and four Scotch whiskey highballs, all of said intoxicating liquors, then and there containing one-half of one per cent or more of alcohol by volume, which was then and there fit for use for beverage purposes.

That the sale of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28th, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America and contrary to the form of the

statute of the said United States of America in such case made and provided. [6]

FOURTH COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof,

NOW, THEREFORE, your informant presents:
THAT

ALBERT C. MORRISON, V. E. LARDI, RICHARD BUCKING, and JOHN ANTONETTI, hereinafter called the defendants, heretofore, to wit, on or about the 30th day of July, 1921, at and in "Techau Tavern," 247 Powell Street, in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully sell certain intoxicating liquor, to wit: two gin cocktails and two Scotch whiskey highballs all of said intoxicating liquors, then and there containing one-half of one per cent or more of alcohol by volume, which was then and there fit for use for beverage purposes.

That the sale of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of

Congress of October 28th, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [7]

FRANK A. SILVA,
United States Attorney.

BEN F. GEIS,
Asst. U. S. Attorney. [8]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

D. W. Rinckel being first duly sworn, deposes and says:

That Albert C. Morrison, V. E. Lardi, Richard Bucking and John Antonetti, on or about the 30th day of July, 1921, at and in "Techau Tavern," 247 Powell Street, in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did then and there maintain a common nuisance in that the said Albert C. Morrison, V. E. Lardi, Richard Bucking and John Antonetti did then and there keep on the premises 247 Powell St., San Francisco aforesaid, certain intoxicating liquor, to wit: gin, whiskey, port wine and red wine, all of said intoxicating liquors then and there containing one-half of one per cent or more of alcohol by volume and fit for use for beverage purposes.

That the keeping of the said intoxicating liquor by the said Albert C. Morrison, V. E. Lardi, Richard Bucking and John Antonetti at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

And affiant on his oath aforesaid further deposes and says: That Albert C. Morrison, V. E. Lardi, Richard Bucking and John Antonetti, on or about the 30th day of July, 1921, at and in "Techau Tavern," 247 Powell St., in the City and County of San Francisco, in the Southern Division of the Northern District [9] of California, and within the jurisdiction of this Court, did then and there possess certain intoxicating liquor, to wit: gin, 1 pint bottle of port wine, one quart bottle of red wine, about 2 quarts of whiskey, 1 quart bottle containing whiskey, and 1 quart bottle containing alcoholic liquor, name of which is to affiant unknown, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said parties above named, was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of October 28, 1919, to wit, the National Prohibition Act.

And affiant on his oath aforesaid further deposes and says: That Albert C. Morrison, V. E. Lardi, Richard Bucking, and John Antonetti, on or about the 29th day of July, 1921, at and in "Techau

Tavern," 247 Powell Street, San Francisco, California, and within the jurisdiction of this Court, did then and there sell certain intoxicating liquor, to wit, two gin cocktails, two loganberry highballs and four Scotch whiskey highballs, all of said intoxicating liquors then and there containing one-half of one per cent or more of alcohol by volume, which was then and there fit for use for beverage purposes.

That the sale of the said intoxicating liquor by the said parties above named was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of October 28th, 1919, to wit, the National Prohibition Act.

And affiant on his oath aforesaid, further deposes and says: That Albert C. Morrison, V. E. Lardi, Richard Bucking and John Antonetti, on or about the 30th day of July, 1921, at and in "Techau Tavern," 247 Powell Street, San Francisco, California, and within the jurisdiction of this Court, did then and there sell certain intoxicating liquor, to wit, two gin cocktails and [10] two Scotch whiskey highballs, all of said intoxicating liquors then and there containing one-half of one per cent or more of alcohol by volume, and fit for use for beverage purposes.

That the sale of the said intoxicating liquor by the said parties above-named, was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of October 28th, 1919, to wit, the National Prohibition Act.

D. W. RINCKEL.

Subscribed and sworn to before me this 3d day of August, 1921.

[Seal] J. A. SCHAERTZER,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Aug. 4th, 1921. W. B. Mal-
ing, Clerk. By Lyle S. Morris, Deputy Clerk. [11]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof in the City and County of San Francisco, on Friday, the 28th day of October, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 9720.

UNITED STATES OF AMERICA

vs.

ALBERT C. MORRISON et al.

Minutes of Court—October 28, 1921—Trial.

This cause came on regularly this day for trial of defendants Albert C. Morrison and V. E. Lardi upon the information filed herein. Said defendants were present in court with their Attorneys, Bert Schlesinger and T. L. Lennon, Esqs. B. F. Geis, Esq., Asst. U. S. Dist. Atty., and R. H. McCormack, Esq., Special Assistant United States Attorney

General, were present on behalf of the United States. Upon the calling of the case, all parties answering ready for such trial, the Court ordered that same do proceed and that the jury-box be filled from panel of trial jurors of this court. Accordingly the hereinafter named persons were duly called, sworn, examined, accepted and sworn as the jurors to try said defendants, viz:

Patrick Hackett	Leonard Brock
J. T. McCormick	D. C. Malcolm
Geo. E. Hosmer	Robert S. Atkins
Robt. A. Lewin	Walter L. Glenn
Christopher Wilfert	Phil Kennedy
Chas. V. Patterson	N. A. Judd.

Thereupon Mr. Schlesinger presented and filed "Notice of Objection" and moved the Court for order excluding certain evidence herein and filed a Search-warrant, etc., as an exhibit, and after hearing Mr. Schlesinger, the Court ordered said motion denied, and an exception to said order was entered. [12]

On motion of Mr. Schlesinger, the Court ordered that all persons to be called as witnesses herein be excluded from the courtroom during the introduction of evidence, except when on the stand.

Mr. Geis made statement to the Court and Jury as to the nature of the case and called A. S. Rinkel, D. D. Simpson, G. H. Crawford, R. A. Wolf, V. H. DeSpain, H. M. Kupser, D. W. Rinkel and R. F. Love, each of whom was duly sworn as a witness on behalf of the United States, and each was examined with the exception of D. D. Simpson, and

introduced in evidence on behalf of the United States certain exhibits which were filed and marked U. S. Exhibits Nos. 1 to 5, inclusive, (bottles and contents).

Mr. Schlesinger then made statement on behalf of defendants.

Thereupon the hour of adjournment having arrived, the Court, after having admonished the Jury herein, ordered that the further trial of this case be and the same is hereby continued to Oct. 31, 1921, at 10 A. M., and that all parties be and appear accordingly. [13]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof in the City and County of San Francisco, on Monday, the 31st day of October, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 9720.

UNITED STATES OF AMERICA

vs.

ALBERT C. MORRISON et al.

Minutes of Court—October 31, 1921—Trial (Continued).

This case came on regularly this day for the further trial of defendants Albert C. Morrison and

V. E. Lardi, who were present in court with their Attorneys, Bert Schlesinger and T. L. Lennon, Esqs. B. F. Geis, Esq., Asst. U. S. Dist. Atty., and R. M. McCormack, Esq., Special Assistant United States Attorney General, were present for and on behalf of the United States. The Jury heretofore impaneled was present and complete.

Mr. Geis recalled D. D. Simpson, who was examined, and then called C. H. Wheeler and J. P. Doyle, each of whom was duly sworn and examined as a witness for the United States, and recalled A. S. Rinkel, who was further examined, and thereupon rested case of United States.

Mr. Schlesinger called C. H. Wall, Albert C. Morrison (defendant), V. E. Lardi (defendant), A. B. Stratgis and John Parish, and introduced in evidence a diagram which was filed and marked Defendants' Exhibit "A," and rested case on behalf of defendants.

Certain exhibits were introduced in evidence on behalf of the United States, which were filed and marked U. S. Exhibits 6 (card) and 7 (menu card).

Mr. Geis recalled in rebuttal, on behalf of the United States, D. D. Simpson and A. S. Rinkel and rested. [14]

The case was then argued by Mr. McCormack, Mr. Lennon, Mr. Schlesinger and Mr. Geis and submitted, whereupon the Court proceeded to instruct the Jury herein, who, after being so instructed, retired at 5 o'clock and 5 minutes P. M., to deliberate upon a verdict and subsequently returned into court at 9 o'clock and 40 minutes P. M. and, upon

being called, all twelve (12) jurors answered to their names and were found to be present, and, in answer to question of the Court, stated they had agreed upon a verdict and presented a written Verdict, which the Court ordered filed and recorded, viz:

“We, the Jury, find as to the defendants at the bar as follows: Albert C. Morrison, Guilty on 1st and 2d Counts, V. E. Lardi, Guilty on 3d and 4th Counts.

ROBERT S. ATKINS,
Foreman.”

Thereupon the Court ordered that the jurors be and they are hereby discharged from further consideration of this case and from attendance upon the court until November 3, 1921, at 10 o'clock A. M. After hearing Attorneys, the Court ordered this case continued to November 4, 1921, for pronouncing of judgment and that defendants go at large upon bonds heretofore given for their appearance herein.

During deliberation of jury, the Court ordered that the U. S. Marshal furnish jury and two bailiffs with dinner at the expense of the United States.

[15]

In the Southern Division of the District Court of
the United States, in and for the Northern
District of California, First Division.

No. 9720.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERT C. MORRISON, V. E. LARDI, RICH-
ARD BUCKING and JOHN ANTONETTI,
Defendants.

**Bill of Exceptions of Defendants Albert C. Mor-
rison and V. E. Lardi.**

The above-entitled cause came on for trial on
Friday, October 28, 1921, at the hour of 10 o'clock
A. M., in San Francisco, State of California, and
a jury having been duly impanelled and sworn
to try the case, thereafter the following proceed-
ings were had, testimony taken, and evidence, oral
and documentary, was introduced on behalf of the
United States and on behalf of the defendants
Albert C. Morrison and V. E. Lardi, as follows:

**OPENING STATEMENT FOR THE GOVERN-
MENT.**

Mr. GEIS.—Gentlemen, I have already stated
to you what this case is about when you were called
and examined; there is very little to add to my
preliminary opening statement, except that the
information is in three counts, the first one being
that the defendants did wilfully and unlawfully

maintain a common nuisance, in that the said defendant did then and there wilfully and unlawfully keep on the premises at what is known as Techau Tavern, 247 Powell Street, City and County of San Francisco, aforesaid, certain intoxicating liquor, to wit, gin, whiskey, port wine, and red wine all [16] of said intoxicating liquors then and there containing one-half of one per cent or more alcohol by volume.

The question of common nuisance will, of course, be covered by the Court in its instructions. I call your attention to that for the moment because of the fact that Mr. Schlesinger asked you if you knew that fact, speaking about its being a common nuisance. What constitutes a common nuisance will be given to you by the Court.

Mr. SCHLESINGER.—So that there will be no misunderstanding about it, Mr. Geis, you certainly do charge that the defendants are maintaining a common nuisance?

Mr. GEIS.—Yes, that is charged.

Mr. SCHLESINGER.—Yes; that is what I stated, and that is the fact—you do charge it.

The COURT.—The Prohibition Statute defines what a common nuisance is in that sense.

Mr. SCHLESINGER.—Yes, your Honor.

Mr. GEIS.—We have four defendants here. Two of the defendants have pleaded guilty—

Mr. SCHLESINGER.—I do not think that is proper, Mr. Geis. The guilt of two men has nothing to do with the guilt or innocence of the main defendant on trial.

Mr. GEIS.—No, certainly not, but I think it is proper for me to make that reference.

Mr. SCHLESINGER.—I don't want the jury misled.

Mr. GEIS.—I haven't any intention of misstating anything to the jury, I just want them to know the facts.

On the 30th of July, 1921, it is charged that they did unlawfully possess one pint bottle of port wine, one quart bottle of red wine, about two quarts of whiskey, one quart bottle containing [17] whiskey, and one quart bottle containing alcoholic liquor, the name of which is to informant unknown, all of said intoxicating liquors then and there containing one-half of one per cent or more of alcohol by volume.

The third count charges a sale on the 29th of July, 1921, a sale of two gin cocktails, two loganberry highballs, and four Scotch whiskey highballs. And then they are charged with another sale of two gin cocktails and two whiskey highballs, all of said intoxicating liquor containing the prohibitive amount mentioned in the National Prohibition Act.

We expect to prove to this jury that these sales were made, and the liquor was found in the Techau Tavern, and we expect to show you that Mr. Morrison was there, and that Mr. Lardi was there, and had at least reasonable knowledge of the sales and the possession.

With that testimony before you, the Government will ask you for a verdict of guilty.

Mr. GEIS.—To make it a little more complete, the Government expects to prove each and every, all and singular, the allegations set out in the information, just as they are alleged. (Tr. pp. 1-4.)

Testimony of A. S. Rinckel, for the Government.

A. S. RINCKEL, a witness called on behalf of the United States, being duly sworn, testified as follows:

My name is A. S. Rinckel. I am a brother of D. W. Rinckel, the prohibition agent. I know the location of the Techau Tavern, 247 Powell Street, in this City and County. I was at the Techau Tavern on the 29th day of July, this year, about eleven o'clock in the evening. I am also a Federal prohibition agent. Miss Simpson and myself visited Techau Tavern, being authorized by John Exnicios who at that time was Prohibition [18] Enforcement Agent, and entered the place about eleven o'clock in the evening; we proceeded to a two-chair table on the side of the dining-room; we then ordered two drinks, loganberry highballs, which were soft drinks, and—

Mr. SCHLESINGER.—If your Honor please, I don't wish to interrupt the witness with objections, but may it be understood that my objections heretofore made go to the testimony of this witness?

The COURT.—Yes.

Mr. SCHLESINGER.—And we reserve our exception.

WITNESS.—(Continuing.) Mr. Morrison was passing the table about that time, and I got up and

(Testimony of A. S. Rinckel.)

shook hands with him and made myself known as Mr. Belmont, stating that I had knew him down at the old place, and that this was the first time I had been in the new place; and I also asked him where Rudolph was. He said that Rudolph was out at the beach at the time and was not working there. A few minutes afterwards Mr. Lardi passing the table, he is the other defendant, I asked him if we could have something with a "kick" in it, and he said he didn't know, that he would have to see Mr. Morrison first. I told Mr. Lardi that I knew Mr. Morrison. He said, "Well, I will see." He then came back in about two or three minutes and asked us what we would have.

Q. By the way, did he go and see Mr. Morrison?

A. Yes, he did.

WITNESS.—(Continuing.) And he asked us what we would have. We said, "Anything with a kick in it." He then brought two gin cocktails. We then asked him if we could have a whiskey highball. He said we could, and we were served with two. In a short time we ordered two more whiskey highballs from the defendant Lardi, which were served. We then asked for our check, which amounted to [19] \$9.27, and Mr. Lardi said there were quite a number of amusements there on Saturday night, and it would be very advisable for us to drop down at about seven or eight o'clock for dinner, which we said we would, and he said he would reserve a table on his station. Then we left and we returned on July 30th. We entered

(Testimony of A. S. Rinckel.)

Techau Tavern about 7:30 on July 30th in the evening, and were seated at a four-chair table on the southeast side of the dining-room, facing the dance floor. Mr. Lardi came up to our table and asked us if we would have something with a smile in it. We said we would. We were served with two gin cocktails. We then ordered our dinner. After serving the salad, we asked Mr. Lardi if we could have a whiskey highball. He said we could, and he would make the whiskey highball double strength, as they were running out of liquor and would not have enough to go around for the guests. He brought them to us. The liquor was served, the whiskey highballs were served. The double-strength whiskey highballs were served in 6-ounce glasses. After serving our dinner, we asked Mr. Lardi if we could have an after-dinner drink. He said we could, and he asked us what we would have, as they would serve anisette, apricot brandy, or any other cordial—after-dinner drink. Miss Simpson then asked him for a coffee royal. A coffee royal is a black coffee with whiskey or cognac. I know gin, whiskey, cognac, brandy and various kinds of alcoholic liquors when I drink them; I know when liquors are strong or weak and I would say from my experience and knowledge of liquor, having drunk it, that the liquor that was served me there that night contained more than one-half of one per cent of alcohol by volume. The coffee royal was never served, but he said he would give

(Testimony of A. S. Rinckel.)

it to us. It was then about 9:20. The arrangements were to have the two drinks on our table at 9:30, when the raid was arranged for. At 9:30 the raid took place by Federal prohibition agents. Agent Crawford took the two drinks of liquor off our table. They were two whiskey highballs of double strength. They had not been consumed [20] by me or by Miss Simpson. They were still in the glass. We then asked for our check. While waiting for our check, a blonde captain came up to our table and told us that if any more prohibition agents came up to our table, to tell them that we brought the liquor in with us.

Q. Who said that? A. A blonde captain.

Mr. SCHLESINGER.—I move to strike that out as not being binding on either of the defendants.

The COURT.—I will let it stand as part of the circumstances occurring there.

Mr. SCHLESINGER.—Exception.

WITNESS.—(Continuing.) Mr. Lardi then came up to our table and asked us if they had taken much of it off our table. We didn't answer him. We told him we were afraid of being arrested, and wanted our check. The check was brought; the amount was \$15.52. We then left our table, and at the entrance of Techau Tavern Mr. Lardi bid us "Good-night," and told us to come back at any time, that it would be as usual. The amount \$15.52 was paid, the same as the \$9.27. I then left. When Mr. Crawford, the prohibition agent, came to our table, he took the two glasses containing the highballs double-strength that Miss Simpson and I had

(Testimony of A. S. Rinckel.)

ordered. They were about half-full; each glass was half-full. We had drunk about half of it in stalling for time. They came in as per arrangement upon my reporting to Mr. Exnicios of the previous night. This raid was arranged and we all understood it, and this occurred in Techau Tavern, 247 Powell Street, in this city and county. (Tr. pp. 4-11.)

On cross-examination the witness testified as follows:

My present position is that of Federal prohibition agent. I was appointed the 27th of this month and after the information had been filed in this case. My brother swore to the information. I was not in the service of the Government when these things happened. We were authorized to make this investigation. My brother was a Government employee. He did not accompany me to Techau Tavern that night. He was there the following night, on the raid. [21]

Q. Were you promised a position in the event of your procuring evidence against the tavern?

A. I was promised a position before this, before this ever happened.

WITNESS.—(Continuing.) I had been out endeavoring to secure evidence in other cases for the Government.

Q. And upon the strength of success you were promised a position were you?

A. No, sir, I was not.

WITNESS.—(Continuing.) I was promised a

(Testimony of A. S. Rinckel.)

position by John Exnicios, who was then Prohibition Enforcement Agent, before this investigation ever took place. There were no conditions of that promise. My brother did not talk over with me the prospect of my receiving an appointment. Prior to my appointment I had helped in six previous cases to this. This is the first case in which I have testified.

Q. Did you ever in your life exchange any word with Mr. Morrison on the subject of selling liquor?

A. I never did.

Q. Do you know him?

A. I know him now. I never seen the man before I went in the Techau Tavern on July 29th.

Q. And how long had you known Mr. Lardi?

A. The first time I had ever seen him was July 29th.

Q. You told him you had known him, did you not? A. I told him I had known Mr. Morrison.

Q. That was not true, was it?

A. No, it was not. (Tr. pp. 11-13.)

Q. You told him you were a friend of Mr. Morrison's, did you not? A. Absolutely.

Q. And that was not true, was it?

A. No, it was not.

Q. Mr. Rinckel, when you entered Techau's on this occasion, you introduced yourself as Delmont, did you not? A. Belmont.

Q. Had you ever gone by that name on previous occasions? A. I have not, sir.

Q. That is not your name, is it?

(Testimony of A. S. Rinckel.)

A. It is not, sir.

Q. You were not appointed to the Government position under that [22] name.

A. No, I was not.

Q. Did you have any other employment on the date of your visit to Techau Tavern?

A. Yes, sir, I did.

Q. What was your employment?

A. I was helping managing an apartment house at 790 California Street.

Q. How long had you been in that job?

A. About a year.

Q. An apartment house downtown?

A. It was at 790 California Street, known as the Leesmount Apartment.

Q. And on that occasion you accompanied Miss Simpson, did you not?

A. To the Techau Tavern, yes, I did.

Q. Is that her right name?

A. That is the only name I know her by.

Q. She was not in the Government service at that time, was she? A. She was not.

Q. Is she now? A. She is.

Q. She is now? A. Yes.

Q. When was she appointed?

A. I do not know, sir; some time last month.

Q. She was appointed after the information filed in this case, and after this raid, was she not?

A. Yes, sir.

Q. Did she reside at the same apartment house with you? A. She did not, sir.

(Testimony of A. S. Rinckel.)

Q. You had known her a long while, though, had you not? A. I had not, no, sir.

Q. Was that the first time she had accompanied you on one of these raids?

A. On these investigations, do you mean?

Q. Yes.

A. Six times previously we investigated together six places.

WITNESS.—(Continuing.) That was the only place that we investigated that night, the 29th.

Q. Had you not been drinking that evening before you went to Techau's?

A. No, sir, I had not. [23] I met her at the Hotel Aldrich, that is on Jones Street, by appointment and for this purpose. Mr. Lardi is the first man in that establishment to whom I applied for a drink that night.

Q. Did you have any conversation with anybody else there with reference to procuring drinks?

A. I did not, sir.

Q. Do you know a Mr. Parrish, employed in that place as one of the captains? A. I do not.

Q. Do you know a Mr. Stratikes, some times called Brown, also employed there?

A. I do not.

Q. Did your companion, Miss Simpson, in your presence, have any talk with either Mr. Stratikes or Mr. Parrish? A. She did not.

Q. Was she with you during the whole time?

A. She was.

Q. Are you able to identify any waiter in the es-

(Testimony of A. S. Rinckel.)

tablishment on that occasion, do you know any of them?

A. Well, I may know one of them by sight.

Q. You had been in there before, had you not?

A. No, sir, I had never been in there before.

Q. Had Miss Simpson been in there before?

A. I do not know, sir.

Q. Did you discuss that subject with her?

A. She said that she was known there.

Q. Do you know that she had applied for drinks there on previous occasions, and had been refused?

A. Yes, she said something about it.

Q. Did she not tell you that she knew of a waiter there who would furnish drinks?

A. She did not, sir.

Q. Did she mention to you the names of the waiters with whom she had an acquaintance?

A. No, sir, she did not.

Q. But she said she was known there? [24]

A. She said she was known by some of the waiters.

Q. Did you not on that occasion, and prior to this alleged talk that you said you had with Lardi, ask Mr. Parrish, one of the captains there, a man who had been there from some eight years, to furnish you with drinks? A. I did not.

Mr. SCHLESINGER.—(To Mr. PARRISH.) Stand up, Mr. Parrish.

Q. Do you recognize Mr. Parrish?

A. I do not.

Q. You did not see him on that occasion?

(Testimony of A. S. Rinckel.)

A. I don't remember him.

Q. Didn't you apply to this Mr. Parrish on that occasion for drinks? A. I did not.

Q. And didn't he say to you at that time that his house was not serving drinks?

A. I never have seen the man before.

Q. Mr. Stratikes,—do you know that man?

A. I do not.

Q. Did you apply on that night to him for drinks? A. I did not.

Q. Who was it that gave you your seat?

A. Oh, I think Mr. Lardi was the man.

Q. Mr. Lardi gave you your seat?

A. Yes, sir.

Q. Did you not apply to Mr. Stratikes for a better table, a table up in front: Do you recall that?

A. Yes, I recall something about a table, but I do not remember the man that seated us.

Q. Then you did apply to someone other than Lardi to have another table, that is, a table known as an inside table?

A. Yes, we applied for an inside table.

Q. Were you given an inside table?

A. We were not.

Q. Was it Mr. Lardi with whom you had that conversation?

A. No, it was some other gentleman we had that conversation with. [25] but I don't remember the man that we had the conversation with.

Q. Can you recall just what you said in that conversation, about getting another table?

(Testimony of A. S. Rinckel.)

A. No, I cannot.

Q. You are not able to say whether or not the man to whom you applied was either of the witnesses whom I have just pointed out to you?

A. I do not recognize either of those men.

Q. You will not say that one of them was not the man, will you?

A. I don't recognize them. Either one of them may have been the man, but I do not recognize them.

Q. Didn't the man to whom you applied state he would ask Captain Parrish whether he could give you a better seat than you had?

A. I don't remember that.

Q. Didn't he return to you, after you had made that request, and state that you could not be given any other table?

A. No, sir, he did not.

Q. What is the fact about that?

A. He may have spoken to Miss Simpson, but he never spoke to me.

WITNESS.—(Continuing.) I was not intoxicated on that occasion. I had not been drinking. I did not enter the place in rather an intoxicated condition.

Q. And isn't that the reason you were refused another seat—isn't that the reason?

A. You mean, sir, that I was intoxicated on that night?

Q. What reason was given why you were not given another table? Was there any reason given?

(Testimony of A. S. Rinckel.)

A. No reason.

Q. You were seated in the rear, weren't you?

A. The first night we were, yes, and the second night we were seated away up in front.

Q. I am talking of the night on which you claim Lardi served you with drinks: Where were you setting then? [26]

A. We were sitting on the side of the house, on the east side of the house, on the side of the dining-room.

Q. It was rather an obscure seat, wasn't it?

A. Yes, it was.

Q. And that is the reason you asked for a better seat? A. We never asked for a better seat.

Q. You asked for another table, didn't you?

A. The first night?

Q. I am talking of the occasion on which you state Lardi served you with drinks: Upon that occasion, where were you seated?

A. We were served by Mr. Lardi upon both occasions.

Q. Do you mean to say that Mr. Lardi escorted you to the table?

A. No, I cannot say that he did.

Q. Is it not a fact that Lardi did not escort you to the table, but that one of these two gentlemen took you to the table?

A. It may be one of those two men, I am not positive.

Q. Whether it may be or may not be, Mr. Rinckel, what is the fact about it?

(Testimony of A. S. Rinckel.)

A. I don't remember the gentleman that seated us.

Q. Why is your recollection on these subjects so dim? Are you able to say that. You have discussed this case, haven't you, quite recently, with Mr. McCormick, the special assistant, located permanently in San Francisco, and likewise with Mr. Geis, and likewise with your brother, Mr. Rinckel?

A. I have not.

Q. Is this your brother here, seated to the rear of Mr. Geis? A. It is.

Q. He is the other Mr. Rinckel? A. Yes, sir.

Q. Did you have anything to do, Mr. Rinckel, or was it your brother, with the re-filling of any bottles, on either of those [27] nights?

A. I did not, sir.

Q. Were you present when two bottles, small bottles were found on the top of a bar there?

A. I was not, sir.

Q. Did you have any participation in the re-filling of bottles taken from Techau's?

A. I did not, sir.

Q. What time of the night was it you entered Techau's?

A. The first time was about 11 o'clock on the 29th of July, and the second time was about half past seven on the 30th of July, the evening of the 30th.

Q. To whom did you pay the checks for the meals you had? A. To a waiter.

Q. Are you able to identify the waiter?

(Testimony of A. S. Rinckel.)

A. I am not.

Q. Did you pay any money at all to Mr. Lardi?

A. I did not, only a tip.

Q. Did you pay any money at all to this waiter in the presence of Mr. Lardi?

A. No, I cannot say that Mr. Lardi was present at that time.

Q. Don't you know, Mr. Rinckel, that on that occasion the house was pretty well filled up, perhaps about 400 or 500 guests—isn't that true? A. Yes.

Q. The tables were all occupied? A. Yes, sir.

Q. Did you know any of the guests there that night? A. No, sir.

Q. Any of your friends there?

A. No, I have no friends who go there.

Q. You know, do you not, that there was a great army of employees there, numbering between 125 and 150?

A. Yes, I know it is a very large place.

Q. But you are not able to give the name of the waiter to whom you paid your check?

A. I am not. [28]

Q. As a matter of fact, wasn't it the same waiter who you claim had served you with drinks?

A. Mr. Lardi served us with drinks.

Q. Did Mr. Lardi serve you with meals?

A. No, he did not.

Q. Did Mr. Lardi give you any check?

A. No, the check was given by another waiter.

Q. Mr. Lardi gave you no check? A. No.

Q. Have you that check? A. No, I have not.

(Testimony of A. S. Rinckel.)

Q. Did you read the check? A. Yes, sir.

Q. Do you know who made out the check?

A. No, sir, I do not.

Q. Did the waiter who gave you this check resemble either of the two men pointed out to you?

A. I never paid any attention to him, sir.

Q. You do not even recall, do you, having seen either of those men in that place on that occasion?

A. No, I do not, sir.

Q. Had you ever been introduced to Mr. Morrison? A. I never had, sir.

Q. You had no more acquaintance with him than you had with any other employee of that establishment? A. I had not, sir.

Q. Do you know Mr. Carleton Wall—he is not here just now—the President of the Techau Tavern Company? Do you know Mr. Carleton Wall?

A. I do not, sir.

Q. Well, in a word, you say that Mr. Morrison never served you with drinks, nor—

Mr. GEIS.—Now, don't get that mixed, Mr. Schlesinger, he didn't say Mr. Morrison served him.

Mr. SCHLESINGER.—I understand that; that is just what I am saying.

Q. Mr. Morrison didn't serve you with drinks, was not present at the collection of the check, and so far as you know had nothing [29] to do with the making out of the check?

A. I don't know what Mr. Morrison did in regard to making out the check, but Mr. Morrison was not present when the check was paid.

(Testimony of A. S. Rinckel.)

Q. Was he present when this so-called order of yours was given? A. He was not.

Q. Did these drinks, which you say you procured there from Mr. Lardi—were those drinks served during your meal or after your meal?

A. They were served during our meal, sir.

Q. And they were served, were they, long before you had finished with your meal? A. Yes, sir.

Q. Is that true, Mr. Rinckel?

A. Yes, on the second night; the first night we didn't have anything to eat at all, on the 29th of July, nothing but drinks.

Q. Did this check, or these checks—by the way, was there one check or two? A. One check.

Q. Your female companion did not pay the check, you paid it?

A. I paid the check, yes.

Q. Did that specify any liquors?

A. It did not.

Q. Was it an itemized check?

A. It was.

Q. Itemizing the different articles of food which you had obtained?

A. Yes, sir. (Tr. pp. 14-23.)

On redirect examination said witness testified as follows:

Mr. GEIS.—Q. When you speak about introducing yourself to Mr. Morrison, was it the gentleman sitting on the other side of the table here, the man with the black mustache? A. It was.

Q. And as to that being Mr. Morrison, or the

(Testimony of A. S. Rinckel.)

man with whom you spoke that night, in which you stated you had known him at the other place, that was Mr. Morrison, wasn't it?

Mr. SCHLESINGER.—He didn't say he knew him at the other [30] place, he said he had been at the other place. According to his admissions, he says he did not know him.

Mr. GEIS.—I realize that.

Q. You can't be mistaken about it being the defendant here, the gentleman who is seated there on the other side of the table, he is the man to whom you spoke that night, is he?

A. He is the gentleman.

Q. And you cannot be mistaken as to the other defendant sitting back there, and known now as Mr. Lardi, and with whom you spoke afterwards?

A. Yes, that is Mr. Lardi.

Q. You said you didn't pay any money to Mr. Morrison. Did you pay any money of any kind or for any purpose to Mr. Lardi?

Mr. SCHLESINGER.—One moment, your Honor, he has testified to that on direct examination.

A. A tip only; I gave him a tip.

Mr. GEIS.—Q. How much?

A. I paid him \$2 the first night, \$1 going in and \$1 coming out, and on the second night I gave him \$2, \$1 coming in and \$1 going out.

Q. That was paid directly to Mr. Lardi?

A. It was, sir. (Tr. pp. 23, 24.)

(Testimony of A. S. Rinckel.)

On recross-examination the witness testified as follows:

Mr. SCHLESINGER.—Q. You paid Lardi a tip? A. Yes.

Q. How much?

A. A \$1 coming in and a dollar going out the first night, and a dollar coming in and a dollar going out the second night.

Q. And you gave him that tip, did you not, at the times you paid the check?

A. After we paid the check.

Q. After you paid the check? A. Yes.

Q. You have just testified that you do identify Mr. Morrison here as one you had seen at the Tavern that evening? A. Yes. [31]

Q. But you are not able to identify anybody else, are you? A. I am not, sir. (Tr. p. 24.)

Testimony of G. H. Crawford, for the Government.

G. H. CRAWFORD, a witness called on behalf of the United States, being first duly sworn, testified as follows:

I am a Federal prohibition agent and have been such for about a year and six or seven months, or something like that, and have been a prohibition agent up to the present time. I was such in the month of July of this year. I know the location of the Techau Tavern. I believe 247 Powell Street is the number. I was at that place on the evening of the 30th day of July of this year, in company with about half a dozen, or something like that, of pro-

(Testimony of G. H. Crawford.)

hibition agents. I think I went there about 9:30 or ten o'clock in the evening. I don't know the exact hour, and I was acting as a prohibition agent when I went there under the direction of my superior officer, Mr. Exnicious.

Q. Will you relate to the Court and the jury briefly just what occurred, and what your duties were, and what you did under those duties as prohibition agent there that evening?

Mr. SCHLESINGER.—If your Honor please, I will preserve the objection heretofore made, upon the grounds enumerated, and also our exception.

The COURT.—All right.

A. It was understood before I entered the premises, that I was to locate the other agents who were in the premises, and seize whatever liquor was on the table. That was my instructions upon going to the place, to the premises, and to pay no attention to anything else but to get to that table. I located the two parties, Mr. Rinckel and Miss Simpson, at a table to the left-hand of the door as we entered, sitting at a small table by themselves, and upon that table were, among other little things, [32] dishes, and so forth, two glasses containing what I took for granted at that time was liquor. They were in—I would call them a thin beer glass, about that height, I guess it was as big around as that, about two and a half inches, or something like that across the bottom, and about six inches high; that is approximating it as near as I can, a good sized beer glass, thin glass. I seized that liquor and took it to

(Testimony of G. H. Crawford.)

the point of assembling agreed upon, where we would assemble with any liquors that were seized, to the front of the place, where Agent Wolf was.

These two glasses that I seized upon that table I took to the central part where we were assembling the liquor, where Agent Wolf was standing. There was no bottle there; our young chemist was there with him, and I asked him if he would get me a bottle. I got a bottle; a bottle was secured by another party for me to put this liquor in. While I was placing it in the bottle, one of the agents was writing a label. I poured that liquor into a bottle and wrote on that bottle in my own handwriting that that was liquor taken from the table.

Mr. GEIS.—Q. I hand you, now, a bottle, and ask you if that is the identical bottle into which you poured the liquor which you secured from Mr. Rinckel's and Miss Simpson's table on the evening of the 30th of July of this year?

Mr. SCHLESINGER.—I object to that because it is not shown to have been in the possession of either one of the defendants, and therefore it is incompetent.

The COURT.—Objection overruled.

Mr. SCHLESINGER.—Exception.

A. This is my handwriting on the bottle. After the label was placed on the bottle with my hands, and in my presence, I wrote [33] on this, "Taken from Rinckel's table by D. H. C." Those are my initials. This is Wolff's handwriting over here, but this is my handwriting.

(Testimony of G. H. Crawford.)

Q. You recognize the bottle? A. Yes.

Q. And you put the liquor that you got off the table into this bottle? A. Yes.

Mr. GEIS.—I will read this into the record, because it might get mislaid in some way. It is marked, "United States Internal Revenue, Prohibition Enforcement Division." On the left-hand corner, as you face it, it says, "R. T. L. Chemist; No. 3098. Dated July 30, 1921, at Techau Tavern, San Francisco. Two glasses taken from Rinckel table by D. H. C. R. A. Wolff." And then there is some printing on it. We offer this in evidence for identification, and ask to have it marked for identification United States Exhibit 1.

Mr. GEIS.—Q. After that had been poured into the bottle, what did you do with the bottle?

A. The bottle was retained in his possession by Mr. Wolff under my instructions.

Q. Mr. Wolff is also a prohibition officer?

A. Yes. After it was caught, it was placed in a box. We carried that to a little room, what I would call a kind of a kitchen or a serving room, to the right of the dining-room, where the liquors were all finally assembled, and all placed in a box to be finally delivered to the chemist. Other agents took possession of the entire liquor, and delivered it to the Government chemist. (Tr. pp. 25-29.)

On cross-examination the witness testified as follows:

On July 30th between 9 and 10 in the evening we went to a table in Techau's restaurant, and I found

(Testimony of G. H. Crawford.)

seated at a table there, in the [34] situation I have already described, the witness Rinckel and the woman Miss Simpson, who is not here now. I would not say that that table was situated in rather an obscure place. I could see the entire dining-room. I don't think there was anything I could not see in the dining-room. As you go in the main door, in the main entrance, like going in the door here, in the central part it was just to the left; there was a whole row of tables along here. It was a little table to the left of the door as you go in; they were seated in there, just a little ways in. The place was filled up with people. I would not estimate how many there were; there was quite a crowd there. I had these other tables in full view.

Q. Your coming there was not announced to the management, or to anybody else, was it? You didn't notify them you were coming there to make a raid, did you?

A. No, we didn't send any telegram, or anything like that. The manager was notified by the search warrant.

WITNESS.—(Continuing.) I found on this table at which my now associate in office was seated, a couple of glasses. I would say they contained liquor. I tasted from one of the glasses myself. The only thing I did was I put one of the glasses to my lips to see what it tasted like. I would say there was alcohol in the drink. I examined later,

(Testimony of G. H. Crawford.)

but not right at that moment, the other tables at Techau on that occasion.

Q. Did you find on any table in Techau's restaurant—any tables—anything that resembled liquor, among those 450-odd guests?

A. There was one bottle that I took from one other table. This was my specific duty, to go to this one table first. I found another table with liquor on it. I think there is another bottle there, branded, that I took from another table.

Q. You went there to make a search for liquors, did you not? [35] A. I did, yes, later.

Q. Other than what you have testified to, did you find any liquor upon any table in that restaurant upon that occasion? A. Yes.

Q. Other than what you have testified to?

A. Other than this liquor that you are talking about here.

Q. Now, you have added that you have found another bottle? A. I found it in a glass.

Q. Other than those two instances, among those several hundred guests, did you find any other liquor at all upon that occasion? [36] Yes or no. If so, where is it?

A. No, I didn't find the other liquor myself; somebody else found it. I found liquor on two tables.

Q. I am asking you what you found on these tables. You were there, were you not, during the entire raid?

A. Well, yes, I was there most of the time.

(Testimony of G. H. Crawford.)

Q. Were you not there all of the time?

A. All of the time, yes.

Q. With whom did you enter that place?

A. We all entered together.

Q. And with whom did you leave?

A. We all left in a body, the same as we entered, as far as my knowledge goes. I don't know if anybody left ahead of me. I think some of the others did leave ahead of me, but who they were I don't know. I was in the general body of men when they went in there.

Q. How many were there in that raiding party?

A. Now, let me see; there was Mr. Rinckel, Mr. De Spain, Mr. Kupser, Mr. Wolff, Mr. Shurtleff, Mr. Wheeler, and myself. I don't know—that might not be all of them, but I think that is as near as I can tell them now out of my head.

Q. There were as many as a dozen, weren't there? A. No, I don't think there were a dozen.

Q. Six or seven? A. I think about seven.

Q. At any rate, those named by you were there?

A. Yes, and I was among the number.

Q. Was there examination made of the main dining-room where the guests were assembled?

A. I think there was.

Q. After that examination was made, did you go to what is known as the servant's bar, near the kitchen? A. No, I did not myself, personally.

[37]

Q. Didn't you accompany the men there on that occasion?

(Testimony of G. H. Crawford.)

A. I stayed up in the other part where the liquor was being assembled; I didn't go down there.

Q. Have you ever examined the Techau Tavern premises?

A. The only time I was ever in there was that night.

Q. Do you not know that adjoining the kitchen there are a great many lockers which are occupied by the waiters and the various employees?

A. I had nothing to do with that part of it.

Q. Let me ask you about this bottle: Did you find that bottle there?

A. I didn't find it there, no.

Q. Was this bottle ever found there?

A. The bottle was brought to me by the chemist, empty.

Q. This bottle, as a matter of fact, was not there. Isn't that true? I am asking you on your official knowledge? A. It was got on the premises.

Q. Do you know who helped fill the bottle?

A. I filled the bottle myself, personally.

Q. What did you fill it from?

A. From the two glasses taken from the table which Rinckel and Miss Simpson were seated. I held those glasses in my personal possession until they went into that bottle.

Q. In other words, you filled this bottle from those two glasses?

A. Yes, absolutely. That bottle was clean, perfectly clean, when that was put in there.

Q. Do you know Mr. Morrison?

(Testimony of G. H. Crawford.)

A. Only just by sight; I never saw him before in my life. That night was the first time I ever saw him.

Q. You saw him there that evening after the raid?

A. That was the only time to my knowledge I had ever seen Mr. Morrison. [38]

Q. After the raid? A. During the raid, yes.

Q. Did you have any conversation with him?

A. I did not.

Q. Did any of your associates have any conversation with him?

A. I am not competent to say. I do not know what they did.

Q. Did you overhear any? A. No, I did not.

Q. Did you hear him say that they could search the place from top to bottom? A. No, I did not.

Q. As a matter of fact, there was a thorough search made there, was there not, without any interference on his part. Isn't that true?

A. Oh, surely.

Q. Now, coming back to Miss Simpson and Mr. Rinckel, do you know how long they had been there before you arrived?

A. Not exactly, no. I know they had been in there a few minutes before we came, I don't know just how long they had been there, some little time.

Q. Had they paid their checks?

A. I don't know nothing about that at all.

Q. Did you observe their condition that night as to sobriety? A. I did.

(Testimony of G. H. Crawford.)

Q. Did you talk to them? A. Yes, sir.

Q. You talked with them both?

A. I spoke to them both right there at the table.

Q. Did you remove this liquor while they were there?

A. Absolutely, right while they were sitting there.

Q. You were not there while they were being served, were you?

A. No; the liquor was waiting—standing on the table, when I came in.

Q. Who placed it there, assuming that it was found there, you have no personal knowledge as to that?

A. Oh, I know nothing about that, no. [39]

Mr. SCHLESINGER.—I think that is all. Now, do you offer this in evidence, Mr. Geis?

Mr. GEIS.—If you have no objections, I will.

Mr. SCHLESINGER.—Well, it is a part of your case.

Mr. GEIS.—Do you object?

Mr. SCHLESINGER.—I am not called upon at this time to object, you have not made any offer. [40]

Mr. GEIS.—Well, you asked me about it. I admit it is not admissible in evidence at this time, if you object to it. But I will offer it now, and see if you will object to it. I offer this now in evidence.

Mr. SCHLESINGER.—I don't object to it, if you will connect it.

(The bottle was here marked "U. S. Exhibit 1" in evidence.) (Tr. pp. 29-35.)

(Testimony of G. H. Crawford.)

On redirect examination the witness testified as follows:

I would say positively that Miss Simpson and Mr. Rinckel were both sober. (Tr. p. 35.)

Testimony of R. A. Wolff, for the Government.

R. A. WOLFF, called as a witness on behalf of the United States, being first duly sworn, testified as follows:

I am a prohibition agent and have been since prohibition has been in effect. On the 30th day of July of this year I was at the Techau Tavern with the balance of the prohibition officers. As we entered the café proper, I took up a station right at the door, where there was a little desk that is used by the waiters, I presume it is used by the waiters, and I stood there while the other agents brought to me the liquor they had seized from the various tables, and I kept charge of that until such time as we had it bottled, labeled, and put away.

Mr. GEIS.—Q. Mr. Wolff, Mr. Crawford brought you several bottles that night, did he—at least one?

A. Not Mr. Crawford. The chemist brought the bottles in, and Crawford and I filled them.

WITNESS.—(Continuing.) I labeled and initialed some of the bottles. That is my handwriting. All the liquor that was taken off the tables was delivered to this little desk and delivered to [41] me and I labeled them. The liquor that was taken off the various tables by the different agents was brought to this little table, and I was in charge of

(Testimony of R. A. Wolff.)

that little table, and kept charge of it, and I put it into bottles and labeled them.

Mr. GEIS.—Q. I hand you another bottle. Is that your handwriting on there? A. Yes, sir.

WITNESS.—(Continuing.) That is one of the bottles delivered to me that evening by Mr. George H. Crawford. It is marked on there “taken from tables.”

Mr. GEIS.—Q. I hand you another bottle; I am not sure whether that is in your handwriting or not. Do you remember that bottle being delivered to you, and if so, by whom?

A. No, I don't know anything about this bottle.

Q. All right, we won't bother with that one. What number of persons, and the names of the persons, were there who brought you bottles there that evening—I mean prohibition agents?

A. I believe there were Crawford, Doyle—those are about the only two. The little chemist—I forgot what his name is, I think it is Adner, or some such name as that, he brought in some bottle from the tables.

Q. How about Kupser and Wheeler?

A. No, sir; they worked in the other part of the house.

WITNESS.—(Continuing.) Those bottles had not been given to him. These agents, Crawford and Doyle, worked around the main dining-room, and gathered a few glasses off the tables, and these other boys went to other parts of the house, scattered throughout the building. I stayed by the

(Testimony of R. A. Wolff.)

little desk, and kept the liquor that was brought to me there. It was in the glasses and then we put it in the bottles. It was finally all taken into the back end of the café and delivered to Rinckel and some of the boys and it was put in boxes.

Q. Rinckel and De Spain?

A. Yes; there were several of them [42] back there. The liquor was finally assembled there by me. I finally turned it over to Rinckel and De Spain. We took it to the back of the house, where several of the boys were, I don't know whether anyone was particularly in charge, and we labeled them and put them in the box. The liquor that was brought to me and assembled in the box I turned over to Rinckel and De Spain in the same condition in which it was brought to me. (Tr. pp. 36-39.)

On cross-examination the witness testified as follows:

Mr. SCHLESINGER.—Q. I will just simply assist your memory, Mr. Wolff, and not contradict you at all. Do I understand that these bottles here, take this bottle, for instance, was that found in any part of the Techau Tavern?

A. Let me see it please.

Q. This is just simply to assist your recollection on the facts, Mr. Wolff.

A. That I don't know anything about, I have no knowledge of it whatever.

Q. Is it not a fact that there was a refilling of some of the bottles—that Rinckel and Rinckel's

(Testimony of R. A. Wolff.)

associates picked up a couple of bottles at some obscure place on the bar, after having searched the lockers, and searched every part of the premises there, they found some stuff in a couple of large bottles, and from those large bottles they filled these smaller ones?

A. I could not tell you anything that took place in the other room, outside of the main dining-room. I was in the main dining-room the major part of the time.

Q. Assuming that to be the fact, Mr. Wolff, if it is a fact, what was the purpose of having taken the two large bottles that they had found there, and refilling these smaller bottles, what was the idea of doing that? A. I don't know. [43]

Q. Was it to make it appear that they made a great big raid there, to spread it out?

A. No, I don't think so. (Tr. pp. 39, 40.)

**Testimony of G. H. Crawford, for the Government
(Recalled).**

G. H. CRAWFORD, recalled for the United States, testified as follows:

Mr. GEIS.—Q. You spoke about a bottle that you picked up from a table. I hand you a bottle, and ask you if that is the bottle you referred to in your former testimony as having picked up from a table on that night?

A. Yes, that was taken from another table.

The COURT.—It was not the bottle?

A. No, it was the liquor, your Honor. It was

(Testimony of G. H. Crawford.)

taken from another table, not the table that Simpson and Rinckel were sitting at.

Mr. GEIS.—Q. And that was assembled with the other liquor?

A. Yes, that was assembled with the other liquor, and then marked as the others.

Mr. GEIS.—We offer this for identification.

(The bottle was here marked “U. S. Exhibit 2 for Identification.”) (Tr. p. 40.)

Testimony of V. H. De Spain, for the Government.

V. H. DE SPAIN, a witness called on behalf of the United States, being first duly sworn, testified as follows:

I am a prohibition agent and have been for mostly two years. I was present with the other officers of the prohibition force on the evening of July 30th of this year at Techau Tavern as one of the raiding officers, and during that period of time that I was there I came across intoxicating liquor.

Q. I now hand you four bottles and I will ask you first about this one; is that one of the bottles that you found? A. Yes, it is. [44]

Q. And this other one, is that one also?

A. Yes.

Q. And is this still another? A. Yes.

Q. And also this one, being the last one of the series of four? A. Yes.

Q. Where did you find those bottles—I mean the liquor that is in them? Then first I will ask you, are those the identical bottles you found?

(Testimony of V. H. De Spain.)

A. They are.

Q. And whatever was in them, so far as you know, is still in them?

A. It is, so far as I know.

Q. Where did you secure them?

A. I found them downstairs in Mr. Morrison's private office, that is, a little room off his private office, where I found these three, and Mr. Shurtleff and I found the other one in the office.

Q. Whereabouts in the office, if you know?

Q. Where he keeps files of his books, and the likes of that, and stationery—in one of those drawers.

Q. What did you do with those four bottles you have just testified to, after you found them?

A. I took them upstairs, and put them with the rest of the liquor that we were gathering.

Q. And who was stationed there near where they were being gathered.

A. Mr. Wolff.

Q. He is also a prohibition officer?

A. He is also a prohibition officer, yes

Q. After the liquor, or the bottles and whatever they contained, has been taken to Mr. Wolff and finally assembled, what became of the box and the liquor then?

A. Mr. D. W. Rinckel and myself took them to the appraiser's building, and locked them up in our storeroom.

Q. Then what was done with them?

A. We took them up to Mr. [45] Love.

(Testimony of V. H. De Spain.)

Q. And by Mr. Love were brought down to the courtroom? A. Yes.

Q. Now, so far as you know, and so far as you are able to testify, are those four bottles in the same condition now—save perhaps as to what was taken out to analyze it—as they were when you found them in the Techau Tavern?

A. They are. (Tr. pp. 40-42.)

On cross-examination the witness testified as follows:

Mr. SCHLESINGER.—Q. On that occasion, I think it was the 30th day of July, you and a large number of your associates made a thorough search of the premises, did you not, the Techau Tavern?

A. Yes, we searched the premises.

Q. That is a very large place, isn't it?

A. Yes.

Q. A large dining-room, and a very large kitchen, and a storeroom; am I right about that?

A. Yes.

Q. Mr. Morrison has two offices there, has he not, one off the dining-room, a small office, and another one, slightly larger, down there adjacent to the kitchen: Am I right about that?

A. I did not see the other office, but I know he has the office downstairs.

Q. He has one office downstairs that you know of? And when you entered the office, was Mr. Morrison there?

A. Not at the time. There was a bookkeeper there, I think, some man in charge.

(Testimony of V. H. De Spain.)

Q. A bookkeeper was working on the books?

A. Yes.

Q. And the office was open?

A. No, there was a catch on the door; he opened it for me.

Q. You told him what your business was there?

A. Yes, sir. [46]

Q. Did he make any objections to your making a search of the place? A. No.

Q. And you thereupon proceeded with your search? A. Yes.

Q. And you found, as I understood you to say, this bottle—I presume it contains—

A. Red wine.

Q. Red wine? A. I think so, yes.

Q. You have not sampled it?

A. No, I have not sampled it.

Q. And this other bottle contains red wine?

A. Red wine, yes.

Q. Where in Mr. Morrison's office, did you find it?

A. In a little store off the office, a little room off the office, I found those three in there.

Q. These three? A. Yes.

Q. What is that, do you know?

A. That is some kind of liquor, I think an after-dinner cordial, I am not sure.

Q. A sort of a cordial?

A. An after-dinner cordial.

Q. You found it there in a storeroom—in a locker? A. No, not in a locker.

(Testimony of V. H. De Spain.)

Q. What do you mean by a storeroom, I don't understand you?

A. It is a little room off his office where he had a number of things stored, I don't remember just what, I think there was some stationery there.

Q. Now, as a matter of fact, you didn't find this in Mr. Morrison's office, did you?

A. I found it right off that office, yes, but not in the office.

Q. As a matter of fact, the kitchen is off the office, isn't it?

A. Yes, but there is no entrance to this other than thru his office.

Q. You can go thru his office and into the storeroom; won't you please describe to the jury, because you have already said you [47] found that in the office, won't you describe to the jury as best you can just what that storeroom is, as to its width and length and general arrangement?

A. It is small, I think it would be about six feet by about ten feet, or eight feet—six feet by eight.

Q. Six by ten or six by eight?

A. Six by eight.

Q. And that storeroom is used as you ascertained there, for what purposes generally?

A. There were shelves there, and there were a number of things, I didn't notice what they were, but there were a number of things in it.

Q. Some merchandise? A. Yes, some towels.

Q. Towels and things? A. Yes.

Q. Isn't there a washstand there?

(Testimony of V. H. De Spain.)

A. I don't remember about the washstand. There could be a washstand there, I don't know.

Q. Adjoining the storeroom is the kitchen, is it not? A. Oh, no.

Q. Is the kitchen on the same floor as the office?

A. It is on the same floor, but it is up from there, it is removed from there.

Q. In what part of the storeroom did you find this stuff, this little red wine and this little colored tonic, or whatever it may be, in what part of the storeroom did you find it?

A. I removed some packages, and setting right in back of the packages on the floor were these two bottles. At the other end of the storeroom behind some other packages, I got that other bottle.

Q. They were not exposed to view?

A. No. They were behind these packages.

Q. And you had to remove that stuff in order to observe the bottles, did you?

A. I was looking for liquor.

Q. You found also in there, did you not, a very large storeroom [48] which was filled with merchandise of all kinds?

A. This was not the storeroom at all. The storeroom where they kept all the supplies was in the extreme other end of the building.

Q. You found a storeroom in which the supplies are kept, in the other end of the building?

A. Yes, sir.

Q. Did you make a search of that room, Mr. De Spain? A. I did.

(Testimony of V. H. De Spain.)

Q. You made a very thorough search, didn't you?

A. We thought we did.

Q. You tried to do the best you could, with the aid of your half dozen or more assistants; did you find any wines or liquors of any kind there?

A. I did not. This is all I found.

Q. Do you not know that this storeroom which you have just described had a telephone exchange in it—in this so-called storeroom?

A. No, that is out of that room and around into another room where the telephone exchange is.

Q. And do you not know that it has a typewriting desk there, and a typewriting machine?

A. I didn't notice that.

Q. Don't you know that it was occupied by others than Mr. Morrison?

A. I don't know anything about it; the book-keeper told me that it was his office.

Q. You made an examination, didn't you, of what is known as the service bar. Do you recall that? Did you aid in that examination? A. No.

Q. Did you make any examination of the tables at which the large number of guests were seated?

A. No.

Q. Did you make an examination of the kitchen?

A. I did, yes.

Q. Did you find any liquor in it? A. No.

Q. Did you make an examination of the lockers?

A. No. [49]

Q. Did you not notice there a great many lockers, used by the employees there?

(Testimony of V. H. De Spain.)

A. I did not. Some of the other agents might have, but I didn't.

Q. That was not done in your presence, Mr. De Spain? A. No.

Q. Did you examine the tables of the main restaurant that night? A. No.

Q. Then all you found, as I understand it, was these bottles partly filled as they are now?

A. That is all.

Q. Did you also find this flask there?

A. Mr. Shurtleff and I together found that.
(Tr. pp. 42-46.)

On redirect examination the witness testified as follows:

Mr. GEIS.—Q. You say there is no entrance to this little place except thru Mr. Morrison's room?

A. That is all.

Q. And no outlet, except as you went in?

A. No, you cannot go on thru, you have to come back thru the same door. (Tr. p. 46.)

On recross-examination, the witness testified as follows:

I went in from the Geary Street entrance direct to the basement and I did not examine the tables. There are two entrances: one from Powell and one from Geary, and I went in the Geary Street entrance. (Tr. p. 47.)

Testimony of H. M. Kupser, for the Government.

H. M. KUPSER, a witness called in behalf of the United States, being first duly sworn, testified as follows:

I am a prohibition agent and have been since the time prohibition went into effect. I was present with the other officers on the evening of July 30th of this year. I went to Techau Tavern as a prohibition agent under the direction of Mr. Exnicios. It was about 9:30 in the evening when I went there. As we entered the premises, Agent Wheeler and myself were together, and we noticed a waiter running toward the rear of the Techau [50] Tavern premises; Agent Wheeler and I followed him to the best of our ability; this waiter ran to the back bar or serving bar back of the dining-room and we there noticed the bartenders attempting to destroy evidence behind the bar. Agent Wheeler got over the bar first, and secured some liquor which was being dumped by one of the bartenders. I got over the bar also and there we seized five bottles, and we took a sample of the liquor of which one of the bartenders was attempting to destroy by pouring it into the sink. We found in all behind the bar—there was one bottle of wine, that black bottle is the wine.

Q. The bottle I now hand you is the one you refer to? A. That is the one.

WITNESS.—(Continuing.) There were three pint bottles containing whiskey, those three that you now have in your hands. There was one quart bottle about two-thirds full of cocktails, and it is the

(Testimony of H. M. Kupser.)

bottle that you now exhibit to me. And a small flask there, half a pint was the flask which Agent Wheeler procured after the liquor was dumped from another container by one of the bartenders in my presence.

Q. Those are the six bottles? A. Yes.

WITNESS.—(Continuing.) After securing the bottles that I have identified they were taken and later labeled and put with the other liquors seized. Before coming into the courtroom, I examined all the labels that are on the bottles at the present time, the labels that were placed there that evening, and they are in the same condition and the same data upon them, and as far as I know the bottles, labels and the contents are the same as I secured there on the evening of July 30th of this year in Techau Tavern, 247 Powell Street, in this City and County. (Tr. pp. 47, 48.) [51]

On cross-examination the witness testified as follows:

Mr. SCHLESINGER.—Q. Mr. Kupser, did you find this bottle at the service bar? A. Yes, sir.

Q. Where is the service bar?

A. The service bar is in the rear of the dining-room, toward the Geary Street entrance.

Q. You found there a very large stock, did you not, of soft drinks, cider, soda water, sarsaparilla?

A. Yes.

Q. In fact, the entire bar was practically filled up and lined up with stuff of that character: is not that true? A. Yes, sir.

(Testimony of H. M. Kupser.)

Q. Did you find this exposed on the bar, or on any of the shelves of the bar?

A. It was found in the bar premises.

Q. Wasn't it really found—just to assist your memory—underneath the bar, at the places where the glasses are washed?

A. This bottle there was found among the other bottles on the drain board of the service bar.

Q. Exposed to view? A. It was there, yes.

Q. And the cork had not been drawn?

A. The cork was drawn.

Q. Had any of this been taken out?

A. The bottle apparently was full.

Q. You found a bartender there, did you?

A. There were two of them.

Q. Did you find any other liquors at that bar?

A. Yes, sir.

Q. What were they?

A. Those bottles, as stated, and so marked.

Q. Were these same bottles found at the bar?

A. Those same bottles were all found at the serving bar, yes.

Q. Were they found underneath the bar or on top of the bar?

A. Some of them were found on the back bar of the service bar.

Q. That is to say, a man entering the bar would not have these exposed to his view, would he?

A. Two of those bottles were [52] found, as I stated, on the back of the service bar, in other words, lying back on a sort of a shelf.

(Testimony of H. M. Kupser.)

Q. But not in view of anyone coming to the bar?

A. No, sir.

Q. Am I right about that? A. Yes, sir.

Q. And what other liquors, if any, did you find there, secreted or hidden as were those two bottles, if you found any? A. That was all.

Q. Was there anyone at the bar at that time?

A. The two bartenders were there.

Q. Mr. Morrison was not there, or Mr. Lardi?

A. If he was, I don't know it.

Q. Did you make a thorough search of the premises there? A. Of the bar premises, yes.

Q. Did you search the storehouse?

A. I did not.

Q. You know that was searched?

A. Some of the other agents were searching.

Q. And nothing was found?

A. I don't know what they found, I can only answer as to what I found.

Q. These two bottles, when they were found, were filled up, weren't they?

A. No, they were not quite full.

Q. Did one of them contain more than it contains to-day? Is it not a fact that stuff was taken out of these bottles and put into other bottles?

A. No, sir.

Q. That is not the fact? A. No, sir.

Q. You did not join in a search of the other part of the premises? A. I did not.

Q. Not of the tables? A. No, sir.

Q. And you were not there when liquor was taken

(Testimony of H. M. Kupser.)

off the table occupied by Miss Simpson and Mr. Rinckel? A. I was not.

Q. Did you ask the bar keeper in charge there as to the reason [53] of this being there?

A. No, we did not.

Q. Did you talk with them at all upon the subject?

A. No, we didn't have anything to say to them.

Q. You didn't examine the kitchen, did you?

A. No, sir.

Q. Didn't you afterwards, Mr. Kupser, return to Techau Tavern, and take with you a number of bottles, and aid in refilling them? A. No, sir.

Q. Didn't you take any bottles there at all?

A. Only those that were seized by Mr. Wheeler and myself.

Q. Did you take any empty bottles there?

A. I did not, no, sir.

Q. Did anybody of your party take any bottles there?

A. I cannot answer the question; I am only answering for myself.

Q. Do you know what the fact is? Well, if you don't know, all right. That is all. (Tr. pp. 49-51.)

Testimony of D. W. Rinckel, for the Government.

D. W. RINCKEL, a witness called on behalf of the United States, being first duly sworn, testified as follows:

I have been a prohibition agent continuously since March 10, 1921, and as such officer I went to

(Testimony of D. W. Rinckel.)

Techau Tavern on the 30th of July of this year. I handled the search-warrant, and in fact, handled the raid, and was in charge and control of the other officers that night, and made so by Mr. Exnicios.

Q. Now, proceed and tell us just what you did from the time you went in there.

A. We went to the Techau Tavern at 9—at 9:30. We agreed to meet at that time with the other agents, Miss Simpson and my brother were there. They were to have the liquor on the table at that time, 9:30 sharp. We went there. I told Mr. Crawford to go to that table and get the liquor, which he did. I told Mr. Wolff to stay close to the door there and collect [54] the liquor that was brought to him by other agents. We went to the back room afterwards, behind the service bar, and we found two men there, bartenders, who had been dumping and destroying the liquor. Mr. Kupser and Mr. Wheeler were behind the bar there collecting the liquor at that time.

Q. Did you see Mr. Morrison there that evening?

A. I did. When we entered, I met a waiter there, and asked him if he would show me to Mr. Morrison, and tell Mr. Morrison to come up, as we had a search warrant for the place. He said he would. He went back and told Mr. Morrison—I believe he told him, because he went right up to him, and Mr. Morrison immediately turned and went out the back and I went back there and served the warrant on him.

Q. The Mr. Morrison you have reference to, and

(Testimony of D. W. Rinckel.)

who, after the waiter spoke to him, went out, is the same Mr. Morrison who sits here? A. Yes.

WITNESS.—(Continuing.) I remained there during the time of the search. After the search was made, the liquor that was found was accumulated in a box by Mr. Wolff. We took it from there to the appraiser's building, and it was placed in the storeroom. The liquor that was placed in the box there that night at the time I took it from the Techau Tavern to the Customs House, and to the chemist, was in the same condition it was when it left the Techau Tavern? (Tr. pp. 51-53.)

On cross-examination the witness testified as follows:

I did not aid in the search of the premises that night, and I did not make any search of the kitchen, or the bar, or any of the places there at all. (Tr. p. 53.)

Testimony of R. F. Love, for the Government.

R. F. LOVE, a witness called in behalf of the United States, being first duly sworn, testified as follows: [55]

I am now and have been for a number of years the Government chemist located at the Customs House in this City.

Q. I now hand you the four bottles which were testified to by Mr. De Spain as having been found in the office of Mr. Morrison, and I ask you if you analyzed the contents of those four bottles?

(Testimony of R. F. Love.)

The COURT.—You had better take them one at a time.

Mr. GEIS.—Q. Did you analyze the contents of this bottle that Mr. De Spain testified to?

A. Yes.

Mr. SCHLESINGER.—Your Honor, that will be subject to my usual objection?

The COURT.—Yes.

Q. What did it contain?

A. 55 per cent alcohol.

Q. Do you know what this is? A. Whiskey.

Q. Is it fit to use for beverage purposes?

A. Yes.

Q. I hand you a second bottle of the four testified to by Mr. De Spain as having been found in the office or the back room of Mr. Morrison in the Techau Tavern: Did you analyze that?

A. Yes.

Q. What is it? A. Wine.

Q. What does it contain in alcoholic volume?

A. 16.35 per cent.

Q. And is it fit to use for beverage purposes?

A. Yes.

Q. I now hand you a third bottle, testified to by the witness De Spain, as having been received at the same place. Did you analyze that chemically?

A. Yes.

Q. What does it contain?

A. Wine, 16.05 per cent alcohol.

Q. And fit to use for beverage purposes?

A. Yes, sir.

(Testimony of R. F. Love.)

Q. I now hand you the fourth bottle, which is the last of the four testified to by Mr. De Spain as having been found at the same place: Did you analyze that? A. Yes, sir.

Q. What does it contain?

A. It contains wine, 19.40 per cent alcohol. [56]

Q. Fit for use for beverage purposes?

A. Yes, sir.

Q. Are these bottles, as they have been handed to you, in the same condition they were when received by you from Mr. Rinckel and Mr. De Spain?

A. Yes, excepting what I took out for analysis.

Q. And did you afterwards seal them up?

A. Yes, sir.

Q. Is the seal that is on them now the seal that you placed on them? A. Yes, sir.

Q. Intact? A. Yes, sir.

Mr. GEIS.—We offer them in evidence, your Honor.

(The bottles were here marked U. S. Exhibit 3.)

Q. I now hand you a bottle that was testified to by Mr. Kupser as having been received in the Techau Tavern on the evening of the 30th of July, 1921, in this City and County, and ask if you analyzed that one? A. I did.

Q. What is the analysis in alcoholic volume?

A. It is whiskey and contains 31 per cent alcohol.

Q. And fit for use for beverage purposes?

A. Yes, sir.

Q. I hand you now a second bottle testified to

(Testimony of R. F. Love.)

by Mr. Kupser as having been received at the same time and place.

A. That also contains whiskey, 30 per cent alcohol.

Q. And fit for use for beverage purposes?

A. Yes, sir.

Q. I hand you a third bottle having been testified to by Mr. Kupser as having been received at the same time and place and under the same circumstances.

A. Yes, that contains 2.80 per cent alcohol.

Q. What is it?

A. I would call it a cocktail, a mixed drink.

Q. Fit for use for beverage purposes?

A. Yes, sir.

Q. I hand you now another bottle, having been testified to by [57] Mr. Kupser as having been received at the same time and place, and under the same circumstances: Did you analyze that?

A. Yes.

Q. What does it contain?

A. It contains wine.

Q. What is the alcoholic volume?

A. 11.05 per cent.

Q. Fit for use for beverage purposes? A. Yes.

Q. I hand you now the fifth bottle as testified to by Mr. Kupser as having been received at the same time and place and under the same circumstances, and ask if you analyzed that? A. I did.

Q. What is it?

A. It is whiskey, 26½ per cent alcohol.

(Testimony of R. F. Love.)

Q. And fit for use for beverage purposes?

A. Yes, sir.

Q. And the sixth and last bottle testified to by Mr. Kupser, as having been received at the same time and found under the same conditions and circumstances: Did you analyze that? A. Yes.

Q. What is it, and what is the alcoholic volume?

A. It contains 13 per cent of alcohol by volume; it is gin mixed with water.

The COURT.—Q. What is the proof of liquor as compared with the alcoholic volume?

A. The proof is just twice the percentage of alcohol by volume.

Q. 25%, as you have given it, would be 50 proof?

A. Yes, sir.

Mr. GEIS.—Q. The bottle of whiskey that you testified to as containing 30% alcohol, that would be sixty proof? A. Sixty proof.

Q. And so on down the line with the others?

A. Yes.

Mr. GEIS.—We offer those in evidence, your Honor, all as one exhibit.

(The bottles were here marked "U. S. Exhibit 4.")

Q. I now hand you "Government Exhibit No. 1," and ask you—

Mr. SCHLESINGER.—I suppose that what you want to show is [58] that it contains more than one-half of one per cent alcohol by volume?

The COURT.—Well, let us have the percentages now as long as the witness is on the stand.

(Testimony of R. F. Love.)

Mr. GEIS.—Q. What does that one contain, Mr. Love? A. The first one contains 11.65%.

Q. And that would be what proof?

A. 23.3 proof.

Q. The bottle you are now testifying to is the bottle marked Government Exhibit No. 1 as having been taken from the table where Mr. Rinckel and Miss Simpson sat?

Mr. SCHLESINGER.—What is the use of wasting time on that?

Mr. GEIS.—What does the other one show?

A. This contains 37 per cent of alcohol by volume.

Q. That would be 75 proof? A. Yes.

Q. And both of those last bottles are fit for use for beverage purposes? A. Yes, sir.

Mr. GEIS.—I offer these in evidence. They have been marked for identification.

(The bottles heretofore marked Exhibit 2 for Identification is now marked Exhibit 2 in evidence.)

The COURT.—Now, you might as well ascertain the alcoholic content of those other two bottles you have on the table there.

Mr. GEIS.—Which two, your Honor?

The COURT.—The two you have on your table.

Mr. GEIS.—I hand you a bottle, and ask you if that is one of the bottles that was brought by Mr. Kupser, Rinckel and De Spain? A. Yes.

Q. What is it?

A. This contains 9% of alcohol by volume; it is a mixed drink.

Q. And fit for use for beverage purposes?

(Testimony of R. F. Love.)

A. Yes, sir. [59]

Q. I also hand you another bottle.

A. It is the same as that, except that it contains 7% alcohol.

Q. And fit for use for beverage purposes?

A. Yes.

Mr. GEIS.—We offer these two bottles in evidence as one exhibit.

(The bottles were here marked “U. S. Exhibit 5.”) (Tr. pp. 53–58.)

On cross-examination the witness testified as follows:

Q. That is rather a poor grade of whiskey that is contained in those bottles, isn't it?

A. Diluted. (Tr. p. 58.)

Testimony of Miss Daisy Simpson, for the Government.

Miss DAISY SIMPSON, a witness on behalf of the United States, previously sworn, testified as follows:

My name is Daisy Simpson. I am and was first appointed prohibition agent about a year ago.

Q. There was a period of time, was there, when you were no longer a prohibition agent?

A. Yes, sir.

Q. And you were subsequently appointed?

A. Yes, sir.

WITNESS.—(Continuing.) On the evening of July 29th, 1921, I was at the Techau Tavern, 247 Powell Street in this City and County. I was with

(Testimony of Miss Daisy Simpson.)

Mr. A. S. Rinckel, generally known as "Gurney" Rinckel. I went into Techau Tavern about 11:00 P. M. We went in there to make an investigation regarding reported violations of the National Prohibition Act, and we were authorized to make this investigation by Mr. John Exnicios, at that time supervising federal prohibition agent. We were seated at a table, on the east side of the dining-room, a two chair table and a waiter came to take our order, and we ordered two loganberry highballs, which were soft drinks. And Mr. Morrison was passing by the table, Mr. Rinckel stood up and said to Mr. Morrison, he said, "How do you do? [60] I guess you don't remember me, Mr. Morrison." And Mr. Morrison said, "Well, your face does look familiar." Mr. Rinckel said he used to come in at the old place, he said it was the first time that he had been in here and asked where Rudolph was, the head waiter at the old place, and he said that Rudolph was at the beach. He left the table and Mr. Lardi was passing, and Mr. Rinckel beckoned to him and said to Mr. Lardi, "We want to get a couple of drinks, something with a kick in it, we know Mr. Morrison." Mr. Lardi asked him what his name was. He said Mr. Belmont. He said, "Mr. Morrison O. K.'s all the orders for liquor and I will have to ask him." He went to Mr. Morrison who was standing about six feet from our table and he said something to Mr. Morrison which I could not hear, and Mr. Morrison looked over at our table, and Mr. Lardi came back in a second or so

(Testimony of Miss Daisy Simpson.)

and said, "It is all right, what do you want?" We said, "Well, oh, anything with a kick." He left and returned to the table with two gin cocktails. We drank the two gin cocktails, and after we drank them we asked him if we could get two whiskey highballs. He said, "Yes, we could," and we gave an order for it and he left and returned with them. Later on we ordered two more gin or whiskey highballs, which were served by Mr. Lardi. We asked him for the check and the waiter brought the *check was* \$9.27. After Mr. Rinckel had paid for the check, Mr. Lardi came to our table and said, "We usually have a nice crowd here on a Saturday night, and if we wanted to come back I will reserve a table at about seven o'clock." And I said, "How do you spell your name?"—no, I asked him what his name was, and he said "Lardi." I said, "How do you spell it?" "Lardi," and he wrote it down on a piece of paper, and he showed me the paper and spelled it out, "Lardi." We left. [61]

Q. Now, you were served, then, according to your statement, with a gin what do you call them?

A. Gin cocktails.

Q. And two whiskey highballs?

A. No, we were served with four whiskey highballs that evening. (Answer read.)

Q. Do you mean four each?

A. No, sir, we were served with two each.

Q. Two each. So that, during that evening, you yourself drank one gin cocktail and two whiskey highballs?

(Testimony of Miss Daisy Simpson.)

A. Yes, sir, and Mr. Rinckel the same.

Q. And Mr. Rinckel the same? A. Yes, sir.

Q. Now, those drinks were fit for use for beverage purposes, were they?

A. Well, we drank them.

Q. And you did drink them? A. Yes, sir.

Q. Now, what day of the week was that?

A. That was Friday, July 29th.

Q. Had you finished—read the answer.

A. That was Friday, July 29th.

Q. 1921? A. Yes, sir.

Q. Did you return on Saturday evening, the next evening?

A. Yes, sir, on Saturday evening, July 30th, about 8:00 P. M.

WITNESS.—(Continuing.) I entered that evening on the Saturday about 8:00 P. M. with Mr. Rinckel, the same Mr. Rinckel that I came with the night previous. We entered the place and Mr. Lardi met us this night and seated us at a table at the south end of the dining-room, a four-chair table, and against the east side wall. After Mr. Lardi seated us he said, "I will bring you a couple of smiles," and he left and returned with two gin cocktails. We ordered dinner from Mr. Lardi, and after we had given our order for dinner, Mr. Rinckel asked Mr. Lardi if we could get two whiskey highballs. Mr. Lardi said, "I will serve you two whiskey highballs, [62] but these will be the only two that I can serve you to-night, but I will make them double strength as we are

(Testimony of Miss Daisy Simpson.)

running short of liquor, and we won't have enough to go around to the rest of the guests." The whiskey highballs were served, dinner was served. After dinner—the dinner was served by the waiter, the whiskey highballs were served by Mr. Lardi. After dinner Mr. Lardi came to our table, and I asked him if we could get two coffee royals, and he told the waiter to bring us in two coffee royals, but before the—well, after he said that, he told Mr. Rinckel, he said, "If you want an after-dinner drink you can have anisette, apricot brandy or any other after-dinner drink that you want—" but before the coffee royals were served, the Federal agents raided the place and Agent Crawford, a Federal agent, seized the two whiskey highballs from our table. After the liquor had been seized from the table, Mr. Lardi came to the table and he said, "Did they get much liquor from your table?" And I said, "No, not very much." Well, he said, "We should have stopped serving sooner." A few minutes after that a man came to the table, that was the captain of waiters, a blond man and he said, "Listen here; if any more of these prohibition agents come around, you say you brought it in with you." Well, the waiter came with our check which was \$15.52 which Mr. Rinckel paid, and as we were leaving Mr. Lardi came up, shook hands with us, and said, "Come back any time, everything will be as usual." We left.

Q. And then you left the place?

A. Mr. Rinckel and myself left the place. (Tr. pp. 64-69.)

(Testimony of Miss Daisy Simpson.)

On cross-examination the witness testified as follows:

I was last appointed September 6, 1921. It was after the raid when I received my reappointment. I am a Federal agent [63] and I am under a salary of \$1600 a year and \$240 a year bonus, \$4 a day subsistence when I am out of town.

Q. Did you officiate in any other raids between July 31st and the date on which you secured this appointment?

A. July 31st and that day—well, I really couldn't say, I know before that I made several investigations before I was appointed, I know before the Techau affair, but I don't know whether after that or not.

Q. You made several investigations without holding any official position at all, is that right?

A. Well, I was authorized to make these investigations by Mr. John Exnicios.

Q. What is the fact, between July 31st and September 31st, did you act in any raid or raids?

A. Well, I will tell you: I think it was about July 21st that I took a temporary investigation for the Pacific Gas & Electric Company.

Q. I have not asked you about that, I have asked you whether, between July 31st and September 1st, you acted in any other raid or raids for the Government? A. July 31st to September?

Q. Yes?

A. Well, I couldn't say unless I would refer to my notes.

(Testimony of Miss Daisy Simpson.)

Q. You couldn't say? A. No.

Q. How long had you known Mr. Rinckel, the one who accompanied you to Techau's as you have stated? A. How long?

Q. Yes, how long had you know him?

A. How long have I known Mr. Rinckel?

Q. Yes?

A. Well, not very long, I met him just a few days before we were to make these investigations.

Q. You met him a few days before?

A. Yes, sir.

Q. You mean you met him a few days before you went with him [64] to Techau's restaurant?

A. Yes, it might have been a few days or a few weeks, I know I met him the day I was to go out with him on investigations.

Q. Under what name were you known as on that case? A. On the day of the raid?

Q. Yes?

A. Oh, I don't know, I didn't give any name at the raid or at the time of the investigation.

Q. Were not you introduced to some captain or waiter there as Mr. Belmont?

A. No, they asked Mr. Rinckel his name and he said "Belmont."

Q. You had been at Techau's on previous occasions, had you not? A. Yes, sir.

Q. You had tried to get liquor there, had *not* not? A. Yes, sir. Well, the captain of waiters told me that, unless I knew Mr. Morrison—he asked me if I knew Mr. Morrison. I said, "No," he said,

(Testimony of Miss Daisy Simpson.)

“Do you know any of his friends?” And I said, “No.” “Well,” he said, “You cannot get any liquor unless Mr. Morrison O. K.’s it.”

Q. Please answer my question, you had applied there before for liquor, isn’t that the fact?

A. Yes, sir.

Q. You had not succeeded in getting it, had you?

A. No, sir, we had on one occasion.

Q. You have answered the question.

A. Well, not on that occasion that we brought the wine in, but before that occasion we had gotten liquor there.

Q. You brought wine in? A. No, I did not.

Q. Didn’t you bring wine to that place about four months before this so-called raid—you yourself? A. No, sir, I did not, an agent did.

Q. What agent brought it in?

A. At that time a Federal agent, [65] Estelle.

Q. You were with him? A. Yes, sir.

Q. Where did you bring it from?

A. I did not bring it, we were in there, and he went out for it.

Q. Where did the agent bring it from?

A. I don’t know. (Tr. pp. 69–71.)

On redirect examination the witness testified, as follows:

Mr. GEIS.—Q. Miss Simpson, you spoke about having received liquor in the Techau Tavern on cross-examination, prior to the 29th day of July. Did you receive liquor there prior to that?

A. Well, liquor was served to other people and

(Testimony of Miss Daisy Simpson.)

myself, I was in a party of seven and the liquor was served, I was trying to think of the captain's name, I think his name is Kye.

Q. And about how long ago was that?

A. Well, I think it was about a year ago last July.

Q. Well, was it since the National Prohibition Act has gone into effect? A. Yes, sir.

Q. Did you hear any conversation between Mr. Lardi and Mr. Morrison?

Mr. SCHLESINGER.—Object to that, on the ground it is redirect examination and should have been brought out in chief.

The COURT.—She has already stated that she did not.

Mr. GEIS.—Q. Did you observe their action at that time? A. Yes, sir, I did.

Q. What was it?

The COURT.—She stated that.

Mr. SCHLESINGER.—I object to that.

The COURT.—She said Lardi went over there and spoke to Morrison and Morrison looked over at the table, and Lardi came back. [66]

Mr. SCHLESINGER.—That is what she said.

Mr. GEIS.—That is all. (Tr. pp. 71 and 72.)

On recross-examination the witness testified as follows:

Mr. SCHLESINGER.—Q. When was it that this agent, accompanied by you, brought wine into Techau's Tavern, what month?

(Testimony of Miss Daisy Simpson.)

A. It was in August.

Q. In August? A. Yes, sir.

Q. August of what year? A. 1920.

Q. Was that the only occasion that you and the agent drank wine in there which had been brought in by yourself, the only occasion?

A. It was the only occasion that I had been in there with agent Estelle and that he brought the wine in.

Q. Were you in the service of the Government at that time?

A. No, I had been recommended, my appointment had not come through, my appointment did not come through until, I believe, around the first of September.

Q. You were appointed later, were you not, after you had brought the wine in?

A. Well, I did not bring the wine in, the wine was brought in for a purpose, Mr. Schlesinger. We felt that, if the wine was brought in, and we got out of it, then we would have an opportunity to order more, that was the reason the wine was brought in.

Q. You were a member, sometime ago, of what was known as the Moral Squad here, doing work for Draper Hand?

A. No, sir, I worked for the State Law Enforcement League, we co-operated with the Moral Squad and with the Government.

Q. You co-operated with Draper Hand?

(Testimony of Miss Daisy Simpson.)

A. Well, co-operated with Draper Hand and other officers.

Q. You worked with him, did you not?

A. Yes, sir. (Tr. pp. 72 and 73.) [67]

On second redirect examination the witness testified as follows:

Why, at that time I was working with the State Law Enforcement League and it was on war-time prohibition and Redlight abatement, and we co-operated with the Government and with the Moral Squad at that time in charge of Captain Goff. In my former employment I was a temporary employee. I received a temporary employment as federal agent. Now, I was reappointed and I received a permanent appointment as federal agent. I mean to say that I first had temporary employment and now I have been given a permanent employment. (Tr. p. 75.)

Testimony of C. H. Wheeler, for the Government.

C. H. WHEELER, a witness called on behalf of the United States being first duly sworn, testified as follows:

I am a Federal agent and have been working for the Government all told about sixteen years. I was appointed gauger, my first assignment was gauger in the Internal Revenue Service, being deputy clerk in charge of the territory around San Jose. I held that position for about nine years. Then in the office in San Francisco, this department

(Testimony of C. H. Wheeler.)

when it was organized in 1920. I was present with other agents on the evening of July 30, 1921, when a raid was made on the Techau Tavern, 247 Powell Street.

Q. During that evening, I will ask you if you secured any liquor from the various tables, or any tables in the main dining-room? A. Yes, sir.

WITNESS.—(Continuing.) I turned it over to Agent Wolfe. He was in charge and he put it in a bottle. I think Mr. Wolf labeled that one, I put my name on the ones that were found behind the bar. I was with Mr. Kupser behind the bar, and I was present when there was some dumping being done by a couple of waiters. [68] In the main dining-room I secured liquor from two tables. They were right following as I went in, I went down between the rows of the tables or down the side between the dance floor and the tables, and pretty well down toward the back of the room, as I entered, I found glasses or cups on two tables, glasses on one and cups on the other. I took them off and turned them over to Agent Wolfe, and then I went into a kind of a pantry, serving-room, a barroom, whatever you would call it. (Tr. pp. 74, 75.)

Testimony of J. P. Doyle, for the Government.

J. P. DOYLE, a witness called on behalf of the United States, being first duly sworn, testified as follows:

I am a Federal prohibition agent and have been such since the enforcement law was passed. I

(Testimony of J. P. Doyle.)

was present on the evening of July 31st or July 30th, 1921, when a raid was made on the Techau Tavern at 247 Powell Street, this city.

Q. I will ask you if on that evening you secured any liquor from the various tables in the main dining-room?

Mr. SCHLESINGER.—(Interrupting.) Is this corroborative testimony of Wolfe?

Mr. GEIS.—No, these are different tables.

A. I took two, I think it was two, I think it was two gin cocktails off of different tables, I took to the left side from the main entrance. I went in and I took two from different tables there. I brought them over to Mr. Wolfe, he was almost at the entrance, at a table to the right of the entrance there and I gave it to him and it was poured in a bottle. (Tr. pp. 75, 76.)

**Testimony of A. S. Rinckel, for the Government
(Recalled).**

A. S. RINCKEL, recalled for the United States, being previously sworn, testified as follows:

Mr. GEIS.—Q. Mr. Rinckel, on the evening of July 30th, 1921, you had something to eat in that place, did you not? [69]

A. We did, sir.

Q. Just tell the Court and jury what you ordered and what you received to eat?

A. We had a squab chicken, artichoke salad, green peas and some new potatoes, no dessert. (Tr. p. 77.) [70]

(Testimony of A. S. Rinckel.)

On cross-examination the witness testified as follows:

These things were all itemized on the checks. The apartment house for which I was a helping manager was conducted by my mother at the time.

Mr. GEIS.—That is the Government's case, your Honor. (Tr. pp. 77 and 78.)

Testimony of C. H. Wall, for Defendants.

C. H. WALL, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

I have been a resident of California all my life, forty years. My father and I were interested in the firm of Hobbs, Wall & Company. I lived for a number of years in Crescent City, Del Norte County. I am President and director of the Techau Tavern Company. It is a corporation and it owns a leasehold of the premises known as 247 Powell Street. Techau Tavern has been in existence in San Francisco as near as I can remember about twenty years. It is a cafe, a high-class cafe. Mr. Morrison is the manager. We have always endeavored to cater to the nicest people, a family trade, and that has been the policy of the tavern ever since it has been under the management of Mr. Morrison, also prior to that, as I understand. The company has never been cited to appear before the Police Department to correct anything in the management of the place.

Q. Has your company ever before been charged

(Testimony of C. H. Wall.)

with a violation of any liquor law?

A. Not to my knowledge.

Q. What is the patronage at that place, in a general way as to women and children patronizing it?

A. Why, the principal patrons of the tavern are women, that is to say, it is a family cafe.

Q. A family cafe? A. Yes, sir. [71]

Q. Mr. Wall, to your knowledge, or with your consent, have any liquors been sold in that cafe during the time of your presidency, or rather, since the prohibition act went into effect, have any liquors been sold there?

A. Well, liquor has been sold there, but not with the knowledge of Mr. Morrison or the directors.

Q. Won't you please explain that in your own way, when you say liquors have been sold there?

A. Well, shortly after prohibition went into effect, we held many consultations regarding the conduct of the tavern from that time on, and it was known, or captains had been known—well, I might say, that, at the time of the war, when there was no sale of liquors permitted to soldiers, men have been dismissed by Mr. Morrison for selling their own liquor to soldiers in there, and there was a great deal of trouble about it at that time, that is not through the authorities but with Mr. Morrison and the help. There were signs printed downstairs at that time. Then, later on, we feared that the same trouble might occur again, and Mr. Morrison wanted to guard against that very carefully,

(Testimony of C. H. Wall.)

so he posted signs downstairs about the bringing in of liquor into the house by employees, words to the effect that they would be dismissed immediately, and on several occasions after that, to my knowledge, they had disposed of liquor in there and were discharged for that very reason.

Q. Has your company sold, kept or maintained liquors there for the purposes of sale?

A. Not to my knowledge.

Q. Now, coming down to the particular two nights in question embraced within this complaint, did you, upon that night, keep or maintain at that place, 247 Powell Street, any liquors for sale to the guests? A. No, sir.

Q. Did you authorize any waiter or waiters in your service to serve liquors to any of the guests?

A. Quite the contrary, [72] they were told, and they were brought before Mr. Morrison for the purpose of listening to just the exact rules about that, and what would happen to them in the event of that sort of thing occurring.

Q. Do you recall how many persons, approximately, are in the service of your corporation at that place? A. I think about 158.

Q. 158? A. Yes, sir.

Q. Do these employees maintain lockers in the establishment? A. They do.

Q. In what part of the building are those lockers maintained?

A. They are in the basement of the building.

Q. I will show you what purports to be a

(Testimony of C. H. Wall.)

diagram of that basement, and ask whether or not this correctly delineates that basement as it existed upon the occasion in question?

A. Yes, this is the plan of the Tavern basement.

Mr. SCHLESINGER.—We will offer this in evidence.

Mr. GEIS.—No objection as long as it is correct.

Mr. SCHLESINGER.—Q. Is this the correct description of the office part of the basement? Look at that carefully, Mr. Wall, and particularly as to showing the location?

A. Yes, sir.

Q. Of an office adjoining that occupied by Mr. Morrison? A. Yes, sir.

Mr. SCHLESINGER.—We will offer this in evidence, Mr. Geis.

Mr. GEIS.—Mr. Schlesinger, would you have any objection to putting it on the blackboard?

Mr. SCHLESINGER.—I have no objection to its being put on there, it is very small and should be larger.

Q. Before that is done, Mr. Wall, I will ask you to please describe that portion of the diagram marked "outer office" and that portion of the diagram [73] marked "telephone operator"?

A. Well, there is a stairway.

Q. And that part marked "private office of Mr. Morrison"?

A. There is little stairway leading down from 325 Geary Street, and you turn to the right as you

(Testimony of C. H. Wall.)

come in, you come into the office of the stenographer and bookkeepers, and there is a door there leading into the office occupied by Mr. Morrison.

Q. Well, now, is there a door leading into what is marked here as the "outer office"? A. Yes, sir.

Q. And called by one of the witnesses a storeroom? A. No.

Q. Is that a storeroom, that marked "outer office," is it a storeroom? A. Why, no.

Q. What is it used for?

A. Why, it is used for the clerical work, the clerical workers, I should say, there is stationery and books of account and checks and so forth, that is check stubs and all that sort of thing, in connection with the business of the Tavern, but nothing to do with the storeroom, that is a long way from it.

Q. Did Mr. Morrison ever occupy that office?

A. No.

Q. Now, please state who did occupy that office?

A. Why, the stenographer and I think the two or three bookkeepers employed there.

Q. There is no question about it?

A. Not a bit in the world.

Q. Never have been to your knowledge?

A. Never.

Q. Now, will you please state how access to that office is gained, to the outer office, how do you get into the outer office?

A. Why, you have to ask the young lady for permission to enter.

(Testimony of C. H. Wall.)

Q. Well, what are the entrances, where do they lead from?

A. They lead, one leads into the kitchen, one leads into the stairway going up to the tradesmen entrance on Geary street. [74]

Q. Has that outer office any direct connection with Mr. Morrison's office?

A. So that you pass through it to go into Mr. Morrison's office.

Q. You pass through it to go in there?

A. Yes, sir.

Q. And, in other words, one going into the outer office cannot pass through Mr. Morrison's office to get access to it? A. Cannot.

Q. Now, where is the entrance to the outer office, where is it located? There is the outer office there, Mr. Wall?

A. Where is the stairway here, I don't see it, going up to Geary street.

Q. That is not shown there, but there is a stairway there.

A. There is a stairway that comes right down, you turn to the left and that is the kitchen, and the chef's desk is right to the left there, a little small office, and you go into the main kitchen. As you turn to the right there is a door there, and that is the office help, that is the bookkeepers and clerical department, the stenographer, you open that swinging door and there is another door which leads into Mr. Morrison's office.

Q. And Mr. Morrison's office is separate and

(Testimony of C. H. Wall.)

apart, is it not, from the outer office?

A. Yes, sir.

Q. Now, is there any stationery or any stationery supplies kept in that outer office?

A. In the outer office?

Q. Yes.

A. I think there is stationery supplies kept in both offices, as near as I remember, there are little lockers there with stationery in it, little drawers.

Mr. SCHLESINGER.—Now, we will offer this in evidence.

Mr. GEIS.—That is all right as long as it is reasonably correct. Defendant's Exhibit "A."

A. I should say also that there are many souvenirs given away, and there are also souvenirs [75] kept in there and things of that sort.

Mr. SCHLESINGER.—Q. A witness testified, Mr. Wall, that they found a couple of bottles of claret, perhaps three bottles, hid in what is designated there as the "outer office," he called it the storeroom. Has that ever been used as a storeroom to your knowledge? A. Never, at any time.

Q. Have you such a place as a storeroom there?

A. We have.

Q. What is kept in that storeroom?

A. Why, in the storeroom, I think, are kept non-perishables. I don't know just exactly, but such as coffee and spices and canned goods and all sorts of things.

Q. Is it called the supply-room?

A. That is called the supply-room.

(Testimony of C. H. Wall.)

Q. And from that requisitions are made for articles of food for the guests, is that right?

A. That is correct.

Q. Mr. Wall, have you ever had any difficulty in guests bringing liquors to that establishment?

A. Yes, sir.

Q. And upon occasions of that character what have you done in the way of stopping it?

A. Why, we have discussed that quite thoroughly at meetings.

Q. Who do you mean by "we"?

A. I mean the directors of the Tavern, including Mr. Morrison, the manager, to find a way to guard against that sort of thing. It is a hard thing to do, you cannot, where you feed and take care of probably 1500 people a day, you cannot tell exactly what they bring in or come in with, you cannot go to them and order them out because you think they have got something covered up, and there have been times that I know of that people have come in there and put bottles on the table and been told that they would have to take them out or leave.

Q. Did you ever give any instructions to waiters or captains as [76] to what they should do in the event of guests bringing liquor to the tables?

A. Mr. Morrison has given them their instructions, to my knowledge told them that they would have to take it out, get rid of it.

Q. Have you endeavored to enforce that rule in every conceivable way, Mr. Wall?

A. Yes, sir, in every way.

(Testimony of C. H. Wall.)

Q. Now, Mr. Wall, we have here in evidence liquor, wine, some found on the tables and some found in some places, it is claimed secreted behind stationery. I will ask you whether the Techau Tavern Company owns these liquors, to your knowledge? A. They do not, to my knowledge.

Q. To your knowledge, were they ever there for the purpose of sale or otherwise, to your knowledge?

A. No, sir.

Q. Did you ever authorize them to be served?

A. I did not, I might add, if I may, that it was not very long ago that a man was dismissed—I cannot just recall his name, but he was a bottle washer there, I think, or worked in that department, he was making wine that he made out at his home, I think, and in turn, brought it down there, according to the old rule, why, the help were permitted to drink so much beer, that is, the cooks behind the ranges,—I think there are 24 employed—their work is very hot, and they were permitted to drink beer, that was their union rules that they were granted so much of that a day to drink. When this law went into effect, of course that ended that, and whether or not they did not want the near beer or whatever it was, I don't know, but this man, later on, brought this wine down and on several occasions a lot of jugs of this red wine were found there, and nobody seemed to know where it came from, until, through some slip, this fellow let out that he was making and bringing it there. Whether he was selling it or not, I don't know. We cleaned [77] that out and

(Testimony of C. H. Wall.)

got rid of him. There has been many, many instances just like that where the help—the tips have been great, and it has been a great incentive to serve their own stuff in there when it was worth while.

Q. Under your employ you have a great many foreign-born?

A. Yes, they are mostly foreign-born.

Q. Greeks and Italians and French?

A. Greeks and Italians and all nationalities, yes, sir.

Q. If they have brought wine in there and concealed it, any of them, or sold it, as you have said, it is entirely without knowledge or sanction, indeed?

A. Yes.

Q. You have a large investment there, have you not, Mr. Wall? A. Yes, sir, we have.

Q. Without going into detail, in a word, representing more than \$100,000? A. Yes, sir.

Q. A great deal more? A. Yes, sir.

Mr. SCHLESINGER—I think you may cross-examine.

The COURT.—Q. What connection has Mr. Lardi with the establishment, Mr. Wall?

A. I presume he is either a waiter or a captain, I don't know, I don't know the names of all of the help, your Honor. (Tr. pp. 78–86.)

On cross-examination the witness testified as follows:

The restaurant opens about noon in the morning, that is about quarter to twelve, I think. The guests

(Testimony of C. H. Wall.)

are permitted to enter about quarter to twelve, between quarter to twelve and twelve. We serve no breakfast there at all. We run until one o'clock, I am not quite positive, I think according to law, the music must stop at one, and after that they do not usually remain [78] very long. I am sometimes there in the evening for my dinner. Not every evening. I should say four or five evenings a week. I am quite positive I was there on the 29th and 30th of July of this year. I did not observe the raid. I was not there. I went there about seven o'clock, and I think I left about nine or nine-thirty. I was absent at that particular time.

Q. If, as a matter of fact, there were liquors sold there and delivered by Mr. Lardi, with the knowledge of Mr. Morrison, you are not upholding that sort of action, are you, as president of that institution?

A. Upholding what sort of action?

Q. If, as a matter of fact, Mr. Lardi served liquor, gin cocktails and whiskey highballs, and Mr. Morrison knew of the fact, are you as president, upholding that action?

A. I certainly am not, no, I am not.

Q. You would not think that was right, would you? A. I would not.

WITNESS.—(Continuing.) I naturally observe, being interested, I am always observing the actions of the help, and also the actions and conduct of the people, that is natural that I would, although, if I have any suggestions to make, I make them to Mr.

(Testimony of C. H. Wall.)

Morrison, I never take any active part. I would know Mr. Lardi if I saw him. I recognize him. He is one of the captain of waiters. I will say that liquor could be sold there by the help without my knowledge.

Q. Don't you think it could also be sold with Mr. Morrison's consent, without your knowledge?

A. I don't think so, no, sir.

Q. What would prevent him if you were not there?

A. Well, I don't think he is that type of man.

Q. I see, and that is the only basis you have?

A. That is the basis we all have. [79]

Q. Is there an office belonging to, or occupied by Mr. Morrison on the lower floor?

A. There is. As you come down on Geary street a little flight of stairs, you turn to the right.

Q. Geary street is the street on the north of Techau Tavern?

A. Yes, sir, that is the tradesmen entrance, and you turn to the right, as you come down, there is a sort of a little steps of probably six feet by about eight, the one to the left says, "Kitchen," to the right says, "Office," or, I would not swear that it says "Office" on the outside door, possibly it does, and there is a little mail-box there, and as the trades people come in they see the sign, either left or right, the help go to the left, the trades people turn to the right, as I say, into this office door. In there is, I think, two bookkeepers and a stenographer and telephone operator, and there is some

(Testimony of C. H. Wall.)

lockers there with stationery and a lot of little pigeon-holed affairs for checks and all sorts of things, kept in there, all the stationery, and you enter that office if you come to transact business. And then Mr. Morrison's office is to the right of that. In there is Mr. Hatton, the cashier. I think he is the only man in there, and the safe is in there, Mr. Morrison's desk is in there and there are Mr. Hatton's books and records kept in there. There are some lockers and pigeon-holes there. There is a little sort of an alcove, and in that is kept souvenirs of all sorts, and stationery of all kinds, there are a great many pads of stationery used in business, and that is the purpose of the office.

Q. Now, in this Mr. Morrison's office is there a little place off from it where some stationery is kept that you have to go into that place from Mr. Morrison's downstairs office?

A. There may be a sort of—I think there is a little—there is a door in there, I don't know how large it is, probably four [80] or six by eight, and in that is souvenirs and, as I say, more stationery and all that sort of thing. There is no egress or no ingress, as a matter of fact, except through Mr. Morrison's office downstairs into that little place. You have to go through Mr. Morrison's [81] office to get in there, and in order to get out you have to come out the way you went in. Our company certainly does not authorize Mr. Morrison to keep liquors there, and if we knew it we would object to it.

(Testimony of C. H. Wall.)

The kitchen is located to the left as you come down this stairway and the kitchen is in there.

Q. Can you go from the kitchen around to Mr. Morrison's office, the one you have just described?

A. Can you go around to it?

Q. I mean on that floor?

A. Well, there is a glass front all around there so that the help can be observed from this little partitioned office.

Q. There was a door through there, one or two or more, so that you could go around in there on the same floor?

A. No, you have got to go through this door into Mr. Morrison's office, and you have got to go through this kitchen door if you come in from the kitchen, and if you come in from Geary street you come down through Geary street, and there are the two little doors there, one says "kitchen" and one says "office."

Q. When downstairs you can go to Mr. Morrison's office or you can go to the kitchen?

A. Why, certainly.

WITNESS.—(Continuing.) The food is cooked in the basement, and when the waiter delivers it to the guest he comes up the stairway. Before it is delivered to the guest it is checked. The man who checks it sits right at the entrance to the stairway. Whatever the guest has ordered and whatever may be the cost of it he checks it, then it is brought to the table. The waiter, as he comes up from the kitchen, writes on it with his pencil, and then it is

(Testimony of C. H. Wall.)

handed to the checking clerk and he stamps it on in typewriting. The check is then kept until the guest asks for it. It is kept by the waiter. If the guest makes a little additional order from what he had ordered first, it goes through practically [82] the same routine, and finally when the meal is finished and the guest calls for his check, it has been written on in pencil or otherwise by the waiter and stamped by the stamp clerk or check clerk and then it comes to the table of the guest with the amount all added up.

Q. Haven't you ever paid for anything there, don't you know how it is done?

A. You are taking me from the kitchen right to the guests, and you are trying to take me through every proceeding, I know that the checks are presented.

Q. I only want to know what you know.

A. I know in a way because of Mr. Morrison's explanation of that system, in order to protect guests and to protect, as near as you can, a waiter from doing just these things that I have referred to, selling his own stuff and keeping his own check and not giving you the check that you ordered with at all, that is done very often, you do not get the check that you think should have been given to you.

WITNESS.—(Continuing.) What I want to explain is, that very often a waiter will give you a check that is not your check at all, and you will pay it. We have tried to guard against that, Mr.

(Testimony of C. H. Wall.)

Morrison has, in order to protect the patrons of the place, they do not look, they simply take what is given them, they do not take their receipt very often. They are also given a receipt at the bottom of the check so there is no mistake about it, each guest is given his receipt, anyone that comes into that place and pays a check gets a receipt for his check, that I do know. That is the rule, all they have to do is to ask for it.

Q. Do you know, Mr. Wall, whether or not the food you serve, or the drinks you serve, or any of them, are subject to Government tax?

A. I believe so.

Q. That sometimes makes the bills come with odd cents, too, [83] doesn't it? A. Yes.

WITNESS.—(Continuing.) The service bar is located near the checker's, it is on the same floor as the cafe proper. The street floor. There is a balcony there, what you would call something like a mezzanine floor.

Q. How do you get to your mezzanine floor, now, we will call this the floor that is above the ground floor, which would be really three floors, the basement being one, the ground floor two and the mezzanine floor three? A. Yes, sir.

Q. How do you get to that floor?

A. Are you referring to the patrons or the help?

Q. Well, either one or both?

A. Why, there are three or four stairways, there is a stairway from the main lobby going up to private tables.

(Testimony of C. H. Wall.)

Q. See if I am substantially correct, Mr. Wall. I am assuming the map to be north—Geary street marked here, Geary street being north, this being Powell street (indicating). The main entrance is from Powell, is it not? A. Yes, sir.

Q. That is a large entrance? A. Yes, sir.

Q. What is the first room on the right-hand side as you come in from the street?

A. The first room?

Q. Before you get to the dining-room?

A. The check-room, the hat check-room.

Q. Now, following, let us assume that this diagram is correct, there is a door there, is there not, at the check-room?

A. No, there is not a door there.

Q. Well, an opening? A. Yes, an opening.

Q. Now, following that on this diagram, there is another opening, what is that, if there is one there?

A. Well, there is the gent's lavatory there. [84]

Q. Is there any way of getting upstairs through that door? A. No.

Q. Where is the ladies lavatory?

A. That place a little—probably twenty or thirty feet further on.

Q. On the same side? A. On the same side.

Q. Well, where is the stairway, if there is any stairway before you reach the main dining-room?

A. There are two stairways.

Q. Let us remain on that side, on the right-hand side as you come in, going west?

A. Well, the entrance to the ladies dressing-room

(Testimony of C. H. Wall.)

is just practically the same entrance as the main dining-room only there is a little curtain there. You turn to the right, there is a stairway going up from the ladies dressing-room.

Q. Up to the mezzanine floor? A. Yes, sir.

Q. Let us take the left-hand side, now?

A. Yes.

Q. Is there an opening there to the left before you reach the main dining-room?

A. Well, just a little before there are two doors going in, one is the dining-room and one is the balcony it is labeled "balcony."

Q. You can reach the mezzanine floor then on either side of the entrance? A. Yes.

WITNESS.—(Continuing.) On the mezzanine floor there are probably ten or twelve booths and a moving-picture projector and a small banquet-room and the dressing-rooms for the entertainers, and the office of the Wall Estate Company. There are no private rooms on the mezzanine floor to entertain guests. The rooms do not all open one into the other, but there is probably a six foot partition separating them, they are not closed, they are not private rooms they are called booths. There is a dance platform downstairs and we have entertainers there in the evening. They are not all [85] ladies, some are gentlemen. The rule is changed quite often, sometimes you have an entertainment of a ballet, then again you will change that to just singers. It is a high-class cabaret, always has been.

The music-stand is located right beside the en-

(Testimony of C. H. Wall.)

trance, right a little above the dance floor. When the waiters come up from downstairs they come up a stairway and here is our checking-man. They get their check and then come into the dining-room.

Q. And who is at the other end here, who sits over here?

A. Why, that is where the bar formerly was.

Q. That is really the service bar at that place, isn't it? A. Yes.

Q. Now, you made a statement, Mr. Wall, that seemed to be positive, that liquors have been sold there? A. Yes, sir.

Q. But, you also added to that, but not with Mr. Morrison's consent?

A. I said, not with the consent of the directors or Mr. Morrison, I might say, the management.

Q. You base that last assertion, however, upon the things which Mr. Morrison would tell you, I believe you stated a while ago, that liquor could be sold by Mr. Morrison without your knowing it?

A. No, I didn't say that.

Q. Well, couldn't it?

A. Yes, sir, and you asked me why I thought he could not do it, and I said because of the faith I had in him.

The WITNESS.—I would like to add: You were referring to Mr. Morrison, why I put the faith in him, that the Tavern company is owned by the widows—the principal stockholders are widows of the original incorporators who have passed and gone, and their daughters, Mr. Morrison's wife and

(Testimony of C. H. Wall.)

his family and the family of [86] Donald MacDonald and the family of Henry Owens and also the Wall family, and it is owing to that fact that it has been Mr. Morrison's policy, and also the policy of the rest of the directors to keep that place clean in all respects, and run it as a high class place, and that is the conduct—

Mr. GEIS.—(Interrupting.) Well, I have not the slightest doubt, Mr. Wall, but what that is your idea about it, I am not attempting to connect you personally with any sale of liquor, you understand that? A. I understand.

Q. And so far as you personally know, you know of no sale that was made there on the 29th or the 30th of July of this year?

A. I do not. (Tr. pp. 86-99.)

Testimony of Albert C. Morrison, for Defendants.

ALBERT C. MORRISON, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

I have lived in San Francisco approximately 25 or 30 years. I am a man of family. I am connected with the Techau Tavern Company as manager, and have been such approximately 18 years.

Q. Mr. Morrison, you are charged in this information, sworn to by Mr. Rinckel, signed by the United States attorney, with having, on the 30th day of July, 1921, maintained a common nuisance at the premises known as the Techau Tavern, in that you had kept on those premises certain intoxicating

(Testimony of Albert C. Morrison.)

liquors. I will ask you whether or not you did, on that day, or at any time, keep in that establishment any intoxicating liquors? A. No, I did not.

Q. I will ask you whether or not you had any knowledge of these liquors which have been put into various bottles, having been kept there, or, if they were there, did you know they were there at that time, or, at any other time, until after the raid?

A. No, I did not.

Q. Did you ever authorize Mr. Morrison, the sale or the disposition [87] to guests of any intoxicating liquors, either on that date, or any other date, since this prohibition act was enacted?

A. No, sir, I did not.

Q. Have you ever authorized any waiters or employees to sell liquors to any of your guests?

A. No, sir, I did not, to the contrary I discharged some.

Q. How many employees did you have, I mean the Tavern company, on the dates in question, approximately?

A. Well, we had more than we generally had, I think it was the Knights of Columbus, or some convention was here, and we may have had approximately between 125 and 150 employees there.

Q. That was to take care of your guests?

A. Yes, sir.

Q. And were those employees scattered in the kitchen and in the main dining-room and throughout the entire establishment?

A. Yes, sir, they were all over the place.

(Testimony of Albert C. Morrison.)

Q. Do you recall, approximately, how many waiters you had at or about that time, without going into details?

A. Oh, I would say in the neighborhood of thirty or more, more or less.

Q. Were your waiters largely made up of the foreign-born elements?

A. The largest percentage are Europeans.

Q. Italians, French and Greeks? A. Yes, sir.

Q. Did you ever allow, since this act became a law, did you allow waiters to bring liquors into your establishment ever for their personal use?

A. No.

Q. What did you do, if anything, with respect to keeping liquor off the place, what warnings, if any, did you give?

A. They were told, time and again, in different ways, we have a sort of efficiency meeting with the waiters at stated periods, at which time the man who has charge of that department talks over different transactions that may have happened, or anything for the [88] benefit of the business, and that thing is frequently brought up, and then I have had signs posted throughout the place where the help congregated.

Q. Are those signs put in a conspicuous place on the premises? A. Yes, sir.

Q. Did you ever have any difficulty, Mr. Morrison, that is, prior to this time, immediately prior to this time, with waiters bringing stuff on to the premises?

A. Yes, sir.

(Testimony of Albert C. Morrison.)

Q. In those instances, what action, if any, did you take towards stopping the practice?

A. Dismissed them.

Q. Dismissed the waiters. Did you ever have any difficulty with guests bringing wines or liquors to the tables?

A. Yes, sir, we have even gone to the point of ejecting some, put them out of the place.

Q. You heard the testimony of a Miss Simpson, I believe that is her name, here upon the stand, having brought into that establishment, on one occasion, or having had an agent bring it in—

Mr. SCHLESINGER.—I will reframe it.

Q. You heard her testimony that an agent, in company with her, had brought in wine into the establishment. Was that brought in with your sanction or concurrence? A. No, sir, it was not.

Q. Did you invite her to bring it in?

A. No, sir.

Q. Have you any acquaintance with that woman?

A. No, sir.

Q. Do you know a man named Belmont, a man named Rinckel, rather, sometimes calling himself Belmont?

A. No, only since the court proceedings here.

Q. Mr. Rinckel testified that, on the occasion of his alleged first visit to that place, that he was introduced to you and that you had a few words with him, do you recall that occurrence?

The COURT.—No, he did not say that, he said

(Testimony of Albert C. Morrison.)

he presented [89] himself to him and said he knew him.

Mr. SCHLESINGER.—I thank your Honor for that.

Q. He claimed that he was presented to you.

The COURT.—No, that he presented himself.

Mr. SCHLESINGER.—Yes.

Q. To you. Now, did that occur, to your knowledge?

A. I have no recollection of it at all, no, sir.

Q. It may have occurred or may not have occurred, is that true? A. It is possible.

Q. How many guests were there upon that occasion, if you recall, approximately?

A. Oh, upwards of four hundred, I would say.

Q. Did you, on that occasion, shake hands with a great many guests some of whom you knew and some of whom you did not know, isn't that true?

A. Yes, sir, there was a convention here and a lot of people had cards and letters of introduction to me and made themselves known, but I would not remember who they all were.

Q. Mr. Morrison, these tables in Techau Tavern are covered, are they not, with table cloths?

A. Yes, sir.

Q. Which can, of course, be removed, linen table cloths? A. Yes, sir.

Q. And do they, or not, extend some distance along the sides of the tables? A. Yes, sir.

Q. It has not been your habit, has it, to peer under the tables to see what the guests have, has

(Testimony of Albert C. Morrison.)

that been your habit? A. No, sir.

Q. You assume that they are obeying the law, do you not? A. Yes, sir.

Q. I will ask you whether or not you are familiar with this diagram which portrays a portion of the basement?

A. Yes, sir, I brought it here. [90]

Q. You brought it here at my request, did you not? A. Yes, sir.

Q. Does that correctly delineate, Mr. Morrison, your private offices with respect to that portion of the place marked "outer office"?

A. Yes, sir, it is made from the architect's drawings with mathematical precision, I would say.

Q. Won't you please describe to this jury, as briefly as you can, the dimensions of your private office, the size of it? A. Approximate?

Q. The approximate size?

A. I would say about seven by ten.

Q. And what is in that office, how is it made up in the furniture?

A. It is faced, in front, with glass windows, and on that front is built in a permanent desk with closets underneath, then there is a safe and then there is my desk.

Q. And are there any other occupants of that particular office with you or do you occupy that alone?

A. No, Mr. Hatton occupies it with me.

Q. And who is Mr. Hatton, please?

A. He is the cashier, office manager, you may say.

Q. Does he keep his books there? A. Yes, sir.

(Testimony of Albert C. Morrison.)

Q. Accounts? A. Yes, sir.

Q. Now, will you please also describe to these gentlemen the office which has been called a store-room, which is marked here "outer office." What are the dimensions of that outer office and where is it situated with respect to your office?

A. Well, making a mental calculation of the distance, I would say it is about ten by twelve by fourteen.

Q. Ten by twelve? A. Yes, sir.

Q. Is that outer office which has been called here by the witness [91] a "storeroom" occupied by any of your help? A. Yes, sir.

Q. And was it so occupied on the occasions in question? A. Yes, sir.

Q. And will you please tell the jury what help—your help occupy that room, that office?

A. The accountant, and an assistant accountant and clerk and telephone operator and stenographer.

Q. Did you have a phone exchange there?

A. Yes, sir, the stenographer attends to the telephone exchange.

Q. Did you occupy that office? A. No.

Q. Now, what was kept there, if anything, in the way of supplies, if you know?

A. No liquors or food supplies of any kind, just what is necessary for the conduct of an office.

Q. Well, was stationery kept there?

A. Yes, sir.

Q. Any food supplies kept there? A. No, sir.

Q. Any liquor supplies, to your knowledge?

(Testimony of Albert C. Morrison.)

A. No, sir.

Q. Had there ever been any liquor kept there?

A. No, sir.

Q. To your knowledge? A. No, sir.

Q. Now, do you also have, in that establishment,
a supply room? A. Yes, sir.

Q. And where is that situated?

A. In the extreme rear of the kitchen.

Q. And what is kept there?

A. Groceries, meats, ham, bacon, everything that
is necessary for the conduct of a cafe.

Q. Do the men have lockers at that establishment,
the help? A. Yes, sir.

Q. Have you access to those lockers?

A. No, they each have their own locker and key,
he has his own locker and then he has his lock and
key.

Q. And where are those lockers maintained, on
what part of the [92] premises?

A. They are maintaintd in the basement of the
Powell Street portion of the premises.

Q. No, on the 30th day of July 1921, a number
of raiders—I have forgotten the exact number—
came into Techau Tavern? A. Yes, sir.

Q. Were you there on that occasion?

A. Yes, but not in the dining-room.

Q. Not in the dining-room? A. No, sir.

Q. Do you recall just where you were?

A. Yes, sir, I was at my desk downstairs, the
raid was pretty well over by the time I was told
of it.

(Testimony of Albert C. Morrison.)

Q. Did they search the premises and all of the premises, to your knowledge?

A. Oh, yes, they had it pretty well searched before I knew of it.

Q. Did they search the lockers of the men?

A. That is my understanding of it.

Q. Was your office searched? A. Yes, sir.

Q. I believe it is in evidence here that some small quantity of liquor was found upon two tables, one table occupied, I believe, by Mr. Rinckel, sometimes calling himself Belmont and Miss Simpson. Do you know how that liquor came to be on that table? A. No, I do not.

Q. Did you see any liquor there—did you see any liquor on that table? A. No, I did not.

Q. Did you sell any liquor to people at that table?

A. No, you see, I am not in the dining-room all the time, I am out of it a large percentage of the time, in fact, I was out of it that night a large percentage of the time.

Q. Now, Mr. Morrison, we have heard some testimony about two tables, will you please state to these gentlemen in a word, about [93] how many tables are in that dining-room and were there on the occasion in question, approximately?

A. This was on a Saturday night, and on Saturday nights when we are busy we put in folding tables, and we tell the patrons, "Now, this is only a makeshift table, if you will accept that, why, we are crowded, we will offer it to you," and that adds

(Testimony of Albert C. Morrison.)

to our regular amount of tables. We have over 100 tables on Saturday night.

Q. Do you know Mr. Lardi, your codefendant, Mr. Morrison? A. Yes, sir.

Q. The remaining codefendant? A. Yes, sir.

Q. How long, please, have you known him?

A. About, ever since he has been in our employ, nearly a year, I guess.

Q. He formerly worked for the Palace Hotel about 14 years?

A. That was his reference that he gave me when I engaged him.

Q. And you looked him up, did you?

A. Yes, sir.

Q. What was his position—his position and his duty?

A. His title is "captain," and his duties consist of floorwalker seating people to the tables when they come in and see that somebody attends to their wants.

Q. Was it a part of his duty to wait on the guests? A. No, sir.

Q. Or to receive payment of checks?

A. No, sir.

Q. Now, talking about checks, it is in evidence here, brought out on cross-examination, that there were checks made out and these checks were itemized with the various articles of food. Will you please explain to the jury, in a word, something about your check system, in other words, whether you keep a check on the food going out of the

(Testimony of Albert C. Morrison.)

kitchen and into the dining-room, how is that done?

A. A waiter is given a check when he has somebody to serve, when [94] he takes their orders it is written on the check, itemized. In addition to itemizing the check his duties consist of putting the cost of the article in front of each item, and each item must be put in singly, not grouped together. Then, when he gets his order from the kitchen, he presents that to the checker, the checkers have a cash register with a contrivance so that check can be put in there, in a sort of a slotted affair so an amount can be recorded. Now, if he brings up the entire order in one tray load, notwithstanding that he has itemized it, the check is rung up in one amount, in a group amount, a total amount, that amount that is on that check must correspond with the total that is itemized by the waiter in his own writing, and that gives you a double check on the food, or anything else that you may serve. Then, just below where the amount is totalled for the patron, there is another small portion of the check known as the stub. The total amount—that check is also put on that stub on account of the war tax, the Government regulations require that each customer, after he has been served and paid his check, must be handed this receipt.

Q. And the customer keeps the receipt, does he, or is supposed to? A. Yes, sir.

Q. Mr. Morrison, Mr. Lardi was asked by Mr. Geis, on redirect examination this question—

(Testimony of Albert C. Morrison.)

The COURT.—(Interrupting.) Who?

Mr. SCHLESINGER.—I beg your Honor's pardon.

Q. I mean Mr. Rinckel was asked by Mr. Geis, on redirect examination, this question, and gave this answer. "You said you did not pay any money to Mr. Morrison, did you pay any money of any kind or for any purpose to Mr. Lardi? And his answer was, "A tip only, I gave him a tip."
[95]

Q. How much?

A. I paid him \$2.00 the first night, \$1.00 going in and \$1.00 coming out and on the second night I gave him \$2.00, \$1.00 coming in and \$1.00 going out?" Did you participate in either of those tips?

A. No, sir, I didn't know anything about it.

Q. You are charged in the second count with having, on the 30th day of July 1921, with having been in possession of one pint bottle of port wine, one quart bottle of red wine, about two quarts of whiskey, one quart bottle containing whiskey and one quart bottle containing alcoholic liquor. Is that a fact, were you in possession of it? A. No.

Q. You are charged, in the third count, with having sold two gin cocktails, two loganberry highballs and four Scotch whiskey highballs. Did you sell any of those liquors, or any part of them?

A. No, sir, I did not.

Q. And finally, in the fourth count, you are charged with having sold, on the 30th day of July,

(Testimony of Albert C. Morrison.)

1921, two gin cocktails, two Scotch whiskey highballs? A. No, sir.

Q. Did you make any such sale as that?

A. No, sir.

Q. And was any sale of that kind made for a tip, or for any other purpose, or for gain, to your knowledge? A. No, sir.

Q. Or with your sanction? A. No, sir. (Tr. pp. 99-108.)

On cross-examination said witness testified as follows:

Mr. GEIS.—Q. Mr. Morrison, your office downstairs has a little room off of it, about six by eight or something like that, has it not

A. No, it has an outer office but the dimensions are bigger than that, the dimensions are greater than that.

Q. Mr. Carleton Wall testified that there is a little space off of your office about six by eight, or whatever the size may be, I [96] don't care how large it is, the entrance is from your office, and no other entrance or other exit, that is correct, is it?

A. He must have misunderstood you, that condition does not exist, there is a correct drawing of it and, if you will bring it here, I will do my best to elucidate it.

Q. You heard also Mr. de Spain telling about where he found the three bottles, and stating that, from your office, he went into a little—and through another entrance and in there he found, I think,

(Testimony of Albert C. Morrison.)

one or two—one in a desk drawer? You heard that testimony?

A. Yes, but that physical condition does not exist, he could not have done it.

Q. Mr. Wall says it does and Mr. de Spain?

A. That will show you that it does not, Mr. Geis.

Q. Well, is your office downstairs, the place where you sit or anybody else sits, has it another little office, or a little room connected with it, through which you can go from that office and cannot get out except without coming back, does such a condition exist downstairs, anywhere?

A. If I understand you correctly, there is *only way* you can get into my office, and that is through that outer office unless you were to break a window from the outside and climb in, but you can only get into my office from that outer office.

Q. Is your office just one room? A. Yes, sir.

Q. And is there no opening except to get in and out? A. Of that door as you see in the drawing.

Q. Well, what place is it that was described by Mr. de Spain and Mr. Wall downstairs where there is another little room, what place is that?

A. I would understand that to be that outer office, the outer office.

Q. I don't care whether it is the outer or inner office. [97]

Q. But there is such a place down there?

A. Yes, sir.

Q. And that is your place, your office?

(Testimony of Albert C. Morrison.)

A. No, it is not my office.

Q. Well, where is your office?

A. You have to pass through a door to go in my office, it is in another room.

Q. Who was in there that night, the night of the 30th of July? A. In my office?

Q. At the time the raid was made?

A. Mr. Hatton and myself.

Q. Were you there when Mr. de Spain came in?

A. No, sir, I was not, Mr. Hatton may have been because one of the men came downstairs and told me the place was being raided.

Q. Where were you when they came in?

A. In my office, at my desk.

Q. Downstairs? A. Yes, sir.

Q. Where did you go from there?

A. After I was told that the place was raided, I went upstairs to where the checkers are, and met Mr. Rinckel, who then, after the place was raided, served me with a warrant.

Q. And you were then downstairs at the time the raid was started? A. Yes, sir.

Q. Then you came upstairs and was served by Mr. Rinckel?

A. After the raid was practically over.

Q. Well, you were served by Mr. Rinckel with a search warrant? A. Yes, sir.

Q. Were you downstairs after that during the time of the raid?

A. I may have been, I don't remember.

Q. Were you down there when Mr. de Spain

(Testimony of Albert C. Morrison.)

came into that office? A. No, sir, I was not.

Q. Then you don't know that Mr. de Spain went down there at all?

A. Oh, no, only from his statement, no, I don't know. [98]

Q. Well, you heard his statement? A. Yes.

Q. And you heard him tell about the little room?

A. Yes, sir.

Q. That was correct, wasn't it?

A. Well, he called it a storeroom, I want to tell you it is an office.

Q. It is some kind of a room?

A. No, it is not, it is an office.

Q. Now, when a guest comes in and gives an order, Mr. Morrison, he has to go downstairs to fill it?

Mr. SCHLESINGER.—Q. The waiter has?

A. The waiter, yes, sir.

Mr. GEIS.—Q. He comes up by a checker?

A. Yes, sir.

Q. And it is checked there?

A. Yes, sir, approximately.

Q. Who sits at this end, or who is at that end? (Indicating.)

A. There are several clerks at that desk.

Q. Well, in any event he has got to pass by the desk? A. Yes, sir.

Q. Now, that check subsequently must go back to whom?

A. To the clerk, to put the total on it.

Q. And that total, after you are all through, the

(Testimony of Albert C. Morrison.)

checks must correspond to the money, must it not?

A. Yes, sir.

Q. And that is why you use that check, too, isn't it, to see whether or not the thing that was rung up corresponds with the check? A. Yes, sir.

Q. That is right, isn't it? A. Yes, sir.

Q. Whatever of money is paid on a check goes into the till and the money becomes the finances of the company? A. Yes, sir.

Q. That is right, isn't it? A. Yes, sir.

Q. In the evening, when you begin, do you give him more than one check at a time?

A. No, only one check.

Q. There is a record made of that check, isn't there? [99] A. Yes, sir.

Q. And that is also numbered, isn't it?

A. Yes.

Q. And that number must come back to the desk?

A. Yes, sir.

Q. Who does he get the check from, in the first instance?

A. A man known as the sheet clerk, he is the custodian of the checks in their blank form.

Q. But, assuming that I am a waiter—I don't think I would make a good one—when I come to serve somebody I have to first go and get a check, don't I? A. Yes, sir.

Q. And that is numbered? A. Yes, sir.

Q. And the stub is left in the book?

A. No, the stub is attached to the check, not even perforated.

(Testimony of Albert C. Morrison.)

Q. What is there to know,—the checker or the man who has the blank check, what is there for him to know whether that man returns that check at all or not, if there is not a blank stub there left in the book?

A. No, it is not left in the book when his check is totalled.

Q. I don't think we understand each other?

A. Yes, sir.

Q. Taking for illustration a bank check, most bank books have a stub attached?

A. This is not on that order at all.

Q. And when we write a check, we tear it off the stub and we sometimes put the date and the number of the check and all that on it for our use.

Now, the man who gives out the check to the waiter, does he have anything left with him to know what becomes of that check or who got that number? A. Yes, sir.

Q. Well, that is just what I want to know. Then suppose my check was \$3.00. I am a waiter?

A. Yes, sir.

Q. Now, he knows that I got that \$3.00, does he?

A. Yes, sir.

Q. And that \$3.00 will turn up sometime that night when you close up? A. Yes, sir. [100]

Q. You have stated, I believe, that if there were three bottles or any amount of liquor found in your office, or any place downstairs, you knew nothing at all about it? A. No.

Q. Now, speaking about these lockers that you

(Testimony of Albert C. Morrison.)

say are on the Powell Street side, and your care in seeing that the waiters do not serve anything or bring anything there, how often did you go through those lockers?

A. I merely go to the region where they are, I do not search the lockers.

Q. You don't know whether they are brought in there at all or not?

A. Pardon. (Question read.)

A. Because it is not necessary, just in anticipation of theft or anything of that sort, the lockers have no panel, they have a wire grating.

Q. What is kept in there?

A. Their clothes, presumably.

Q. Just their clothes, they change their clothes and put on their waiter's uniform, or whatever it may be? A. Yes.

Q. That is all that is used in there?

A. That is all they were intended for, Mr. Geis.

Q. But you don't go through them very often to see whether there is any liquor in there, do you?

A. No, I go there occasionally to inspect the premises, to see if the people are doing their work, in so far as cleanliness is concerned, in the general direction of a business.

Q. You say those lockers are on the Powell Street side or on the Geary Street side?

A. They are on the Powell Street side, yes, sir.

Q. How far from the kitchen?

A. Directly adjoining.

(Testimony of Albert C. Morrison.)

Q. Is there any opening to that from the kitchen? A. Yes, sir.

Q. Now, if a waiter was to serve liquor from downstairs, if he had it in his locker, of course, he would have to go to his locker [101] and get it? A. Yes, sir.

Q. Now, when he came upstairs and went by the checker, what would the checker do?

A. Do you mean if he saw the liquor?

Q. If he saw something in a glass, what would he do? A. Do you mean if he saw the liquor?

Q. If he saw something in a glass, what would he do?

A. Why, he would not tolerate it if he was following his orders.

Mr. SCHLESINGER.—I submit that is not exactly a fair question.

Mr. GEIS.—I will withdraw it.

The WITNESS.—I may add, Mr. Geis—

Mr. SCHLESINGER.—Mr. Morrison, add nothing. A. So he will get through.

Mr. GEIS.—If you have anything you want to say, I will be glad to hear it.

A. I was about to say that waiters sometimes have had chickens in their pockets and we discharged them for having chickens in their pockets. They get chickens cooked down in the kitchen and put them in their pockets and then when they got inside they would pull them out and serve the guests in some manner, and we would discharge them for that the same as we discharged them for selling

(Testimony of Albert C. Morrison.)

liquor. Those things are possible without the connivance of the manager.

Q. Mr. Morrison, I want to ask you, would you mind coming here just a minute? A. Yes.

Q. The top of the map which you have introduced in evidence, of course, is the north, and the north of that is Geary Street, isn't it?

A. The north of our premises would be.

Q. Now, I call your attention to what is known as the "outer office," marked there "outer office," do you notice that? A. Yes, sir. [102]

Q. Here to the right of the map as it hangs, which would be to the east, is marked "Closet" or something—what is that?

A. That is a clothes closet.

Q. And what size is it?

A. I would say about two and a half by four, two and a half by three and a half, probably.

Q. Just next to it, up on this other side, Mr. Morrison, further east, there is another closet?

A. Yes, sir.

Q. What size is that one?

A. That is a closet with a lot of shelves in it.

Q. About what size?

A. I would say that is about three by five.

Q. Is there any exit or entrance into the office save from your own office? A. No, there is not.

Q. Mr. Morrison, during the recess I called you up? A. Yes, sir.

Q. You recognized me, did you? A. Yes.

(Testimony of Albert C. Morrison.)

Q. I asked you to bring with you, if you could, a menu used by the Techau Tavern of July 31st?

A. Yes, sir.

Q. Were you able to find one?

A. No, I brought two menus so to be sure I would be right.

Q. You did what?

A. I brought two menus so as to be sure I would be right, I brought the former one that we used for lunch and dinner, and then I brought the one that we used after the theatre hour, which is approximately the same all the time. Then I also brought the waiter's check that you asked me for.

Q. Are these the things that you brought, Mr. Morrison, from your place?

A. At your suggestion.

Q. What became of the checks that were used on the evening of July 31st, 1921?

Mr. SCHLESINGER.—July 30th?

Mr. GEIS.—Q. July 30th, yes?

A. Well, I think they [103] are destroyed, we destroy them at regular intervals because they are cardboard checks and there are a good many of them, and the accumulation would be so that they could not consistently or conveniently be kept, they would serve no particular purpose to keep them, we generally kept about a month's supply of checks.

Q. In any event, you do not have it? A. No.

Q. Did you make any search of your premises

(Testimony of Albert C. Morrison.)

for the checks? Now, when I say "checks" I mean these cardboard checks for July 30, 1921?

A. No, I don't think we did.

Q. Now, the form of check, however, that was used generally, and used on that night, is the same as this, the general form of the check?

A. Yes, sir, you see this is the part that I meant, that the customer, by the Government regulation, the Federal regulation, a customer should get this, this is a receipt for what he should pay.

Mr. GEIS.—Now, I will ask that this be introduced in evidence.

Mr. SCHLESINGER.—No objection.

Mr. GEIS.—U. S. Exhibit No. 6.

Q. The menu that you used during the day is substantially the same as that used in the evening?

A. The one in your left hand that would be used at the luncheon hour, and at the dinner hour up to say nine o'clock, then this one would take its place.

Q. If it is a fact that the dinner was ordered on July 30, 1921 about—oh, say, 7:30, which one of these would be used?

A. The one in your left hand.

Q. And the one in my right hand would not be used until about half-past nine?

A. Nine o'clock or thereafter.

Q. And it is then safe to say that the one actually used by Miss [104] Simpson and Mr. Rinckel on the evening of July 30, 1921, if they

(Testimony of Albert C. Morrison.)

ordered at the time they claim, 7:30 or along in there?

A. Would be sure to be the one in that form.

Q. And this one here would be substantially the same as the one used on July 31st? A. Yes, sir.

Mr. GEIS.—No objection to having that in?

Mr. SCHLESINGER.—No objection at all.

The COURT.—When you say July 31st you mean July 30th, you can stipulate to that.

Mr. GEIS.—Occasionally I use the numerals 31.

The COURT.—Well, the testimony is that on the evening of July 29th the parties mentioned ordered nothing but liquor and on July 30th they ordered dinner.

Mr. SCHLESINGER.—That is their testimony, yes.

Mr. GEIS.—I think that is all.

Mr. SCHLESINGER.—No further questions.

(Tr. pp. 109–118.)

Testimony of V. E. Lardi, for Defendants.

V. E. LARDI, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

I am captain of waiters at Techau Tavern. I have been employed there probably nine months, and was such captain of waiters on the nights of July 29th and 30th, this year. I think I saw or spoke to A. S. Rinckel and Miss Daisy Simpson, who have testified here, on either of those nights I may have spoke with a man named Belmont who

(Testimony of V. E. Lardi.)

had a woman with him on the night of July 29, 1921.

Q. You are sure—what makes you sure that you spoke to a man named Belmont on that night?

A. Well, when any captain sees the guests, why, he goes over and takes the order, and I goes [105] around and I notice Mr. Belmont was feeling pretty good.

Q. How did you know it was Mr. Belmont, did he speak to you, did he introduce himself?

A. The way I got the name was when they made their reservation.

WITNESS.—(Continuing.) Mrs. Belmont made the reservation, that is, the woman giving her name as Mrs. Belmont. Neither did this woman or Mr. Belmont on that night, or on either of those nights, ask me for a drink of intoxicating liquor.

Q. Did you, on that night, or on either of those nights, speak with Mr. Morrison concerning any service whatsoever to Mr. Belmont and his pretended wife?

A. No, sir, the first place, I do not serve anything.

Q. To the woman who said she was Mr. Belmont's wife to you, did you serve any intoxicating liquor?

A. No, sir, I did not, I don't serve anything at all.

Q. Did you ever serve any intoxicating liquors to anyone at any time in Techau Tavern?

A. No, sir.

(Testimony of V. E. Lardi.)

Q. Did you receive any money from Mr. Belmont at any time in Techau Tavern?

A. I don't think I did, I may receive money like any other guest when they go out and said good bye to me and give me a tip at the door.

Q. He might have given you a tip?

A. He might.

Q. On the night of the raid did you speak to Mr. Belmont or the woman who was with him after the raid and tell them to come to the Tavern again?

A. Not in that manner, the only way I spoke to them, when they said good bye to me, I told them to call again when they left the place.

Q. You told them to call again?

A. I shake hands and said, "Call again."

WITNESS.—(Continuing.) I did not say anything to them at [106] all concerning the raid. Prior to my employment at Techau Tavern I was captain at the Palace Hotel for about 14 years.

Q. Did you turn any money that you might have received in tips in to Mr. Morrison or to any officer of the Techau Tavern Company?

A. No, sir, that belongs to me, the tips. (Tr. pp. 118 to 120.)

On cross-examination the witness testified as follows:

I could not tell where Mr. Belmont and the lady were located because another captain seated them. Another captain seated them at both times, I never seated them at all.

(Mr. A. S. Rinckel and Miss Daisy Simpson are

(Testimony of V. E. Lardi.)

brought into the courtroom and stand at the counsel table.)

Mr. GEIS.—Q. To the best of your recollection is that the man who said his name was Belmont?

A. I couldn't say exactly whether it was him or not.

Q. Now, here are the two persons, the one who gave his name as Belmont and this is the lady that was with him. Now, do you recognize them?

A. I couldn't remember them at all, to tell you the truth.

Q. You don't remember either of them?

A. No, I see so many guests there that I cannot exactly remember whether they are the party or not.

Q. You cannot recognize them at all, they look to you like perfect strangers, do they?

A. Well, I may have seen them, but I couldn't place them exactly.

Q. Now, you intimated that one of them was not very sober, you intimated that one of them was not very sober, did you? A. Yes, sir.

Q. Well, which one of these was it?

A. They were both acting the same way as one another.

Q. You say you don't know them? A. No, sir.
(Tr. pp. 120-121.) [107]

On redirect examination the witness testified as follows:

On the night in question when Mr. Belmont spoke

(Testimony of V. E. Lardi.)

to me I noticed or I thought that he was under the influence of liquor, and I recalled that it was Mr. Belmont because they had made a reservation. I do not wait on the tables. I do not make out checks. I am there as captain to seat the guests, that is what I do. (Tr. p. 121.)

Testimony of A. B. Stratikis, for Defendants.

A. B. STRATIKIS, called as a witness on behalf of the defendant, Morrison, being first duly sworn, testified as follows:

I am the head man of the Techau Tavern dining-room. I have been working there about eight years.

Q. And have you noticed a woman you saw here Friday afternoon, a Miss Simpson?

A. I have seen her, yes, sir.

Q. About when, what time did you first meet her?

A. The first time I met her it was about—

Q. (Interrupting.) Having in mind the time of this raid, how many days before then did you see her?

A. About three or four months prior to the raid.

Q. And won't you please state, as briefly as you can, the circumstances under which you saw her, just tell the gentlemen in the box here?

A. She came up to the private dining-rooms one night—

Mr. GEIS.—(Interrupting.) What is the purpose, Mr. Schlesinger?

(Testimony of A. B. Stratikis.)

Mr. SCHLESINGER.—We want to show she applied for drinks, I want to show that she and her companion, an agent, had a bottle of wine and were ordered off the premises.

Mr. GEIS.—If it is for the purpose of impeachment, I insist that you ask the witness a direct question. For impeachment you are required to ask the same question. [108]

Mr. SCHLESINGER.—There is no doubt that it is a technical rule of law.

The COURT.—There is nothing to impeach, the witness herself testified she was there, that they brought in a bottle of wine.

Mr. SCHLESINGER.—And that she was ordered out of the place, do you admit that?

Mr. GEIS.—What is that?

Mr. SCHLESINGER.—That they were ordered off the premises.

Mr. GEIS.—No, I won't admit it, she didn't say she was ordered off the premises.

Mr. SCHLESINGER.—Q. What is the fact about it, what happened three months earlier than this raid with respect to that woman?

A. She came one night, it was a Saturday night about ten o'clock, she sent for me, she was in the private dining-room, and when I went upstairs she said to me that she was sent from some friend of mine whom she mentioned the name, but I don't remember the name, and she said that she wanted to have a drink. I told her that we didn't serve any drinks. She insisted that we did, and I told

(Testimony of A. B. Stratikis.)

her that we do not. I left her, within twenty minutes she sent for me again and I went upstairs and she offered me a glass of red wine in a water glass. She told me that I was very mean, that I refused her, and she had to go outside and get her own wine. I told her that I did not care to drink her wine, and she was not allowed to have served the wine in there, and I told her that she could not drink the wine there. As a matter of fact, I asked the waiter that was waiting on them whether she had ordered any food, to cancel it, and the waiter said that they did not have any order of food ordered yet. I went downstairs and reported [109] this to Mr. Morrison and he asked me to go upstairs right away and order her out which I did, but, by that time they had gone.

Q. Would you be able to identify the man who accompanied her on that occasion, the agent of the Government who was with her?

A. I couldn't see him very well, he was on the left-hand side of the room.

Q. Now, when did you next see Miss Simpson, if at all, about when?

A. I saw her on the night of the raid, the last Saturday of the month of July.

Q. Were you on the floor that day?

A. Yes, sir.

Q. The dining-room was crowded with guests, was it not? A. Yes, sir.

Q. Every table occupied? A. Yes, sir.

Q. Did you have any conversation with her?

(Testimony of A. B. Stratikis.)

A. I did not have a direct conversation with her.

Q. Did you with the man who accompanied her?

A. With another one.

Q. Did you observe their condition? A. I did.

Q. What was their condition as to sobriety?

A. Mr. Jack Parrish, the captain whom I had in charge that particular night, reported to me—

Q. What did you see then?

A. It appeared that Mr. Belmont had made reservations that night with Mrs. Belmont. They came there by a little—

The COURT.—Q. What you saw.

The WITNESS.—I saw Mr. Belmont and Mrs. Belmont had made reservations for 7:30.

Mr. SCHLESINGER.—You saw that?

A. I saw the name [110] on the book, this is about eight o'clock, Mr. and Mrs. Belmont both came, but my assistant at the door received them, I did not receive them, and sent them to a table nearby the door, and after they sat there they asked him for a better table and for something to drink.

Q. Who did they ask?

A. They asked Mr. Parrish, the man that I had assisting me at the door.

Q. Within your hearing—if not, you must not repeat it, did they ask Mr. Parrish within your hearing for a better table?

A. No, but Mr. Parrish came and reported to me.

The COURT.—Just what you know.

A. He came and reported to me that Mr. Belmont and Mrs. Belmont had arrived and they were

(Testimony of A. B. Stratikis.)

sitting right at the table nearby the door.

Mr. SCHLESINGER.—Now, did they get a better table, did they receive a better table?

A. They did not.

Q. And why? A. I told Mr. Parrish—

Q. (Interrupting.) Just give us the fact, why didn't they receive a better table?

A. They looked to me that they were both intoxicated.

Q. I will ask you whether or not you saw any liquor served to them that night? A. I did not.

Q. Did they apply to you for drinks on that occasion? A. They did not. (Tr. pp. 122–125.)

On cross-examination the witness testified as follows:

I saw a reservation in my reservation book. I couldn't say who put it there, I have eight captains in my dining-room besides myself who are authorized to take reservations and enter them in the reservation book. There was no captain of that particular table where these people were seated, it was an extra table placed nearby the door. [111]

The nearest captain to that place was myself and my assistant. My assistant is Mr. Jack Parrish. Mr. Lardi is a captain. He is in another neighborhood. I did not see them coming in but I saw them when they were already seated at the table. When they were seated at the table I was standing right at my desk. It is about four or five feet from their table. They were looking at the crowd, watching. I did not speak to them. I went as close as this,

(Testimony of A. B. Stratikis.)

and I looked at them and that is all, I did not talk to them. Mr. Parrish talked to them in my presence. I did not hear what he said and I don't know what he said to them. When I next saw them they were sitting at another table to the left end of the house. The whole dining-room in under my supervision. They were about forty feet away from where they were seated. They got another table. I did not see them going over to the other table. I do not know how long they were there. My duties there in the evenings are supervising the whole dining-room, taking orders, see that the orders are served properly and giving orders to the captains and waiters to serve the food. Once in awhile I go downstairs. I say the so-called Mr. and Mrs. Belmont were drunk because they appeared to me, from the way they were looking at each other and the crowd that they were drunk. I can always tell a drunken man from a sober man.

Q. All you base it on, then, is the way they looked at each other and the way they looked at the crowd?

A. From the fact that they had applied to me for drinks before that, prior to that, and from the fact that I had seen them having the wine, I saw them drinking the wine which they offered to me and I refused.

Q. That is the reason you thought they were drunk that night?

A. They acted to me like they were drunk.
[112]

(Testimony of A. B. Stratikis.)

Q. And the only thing that you say that you saw the macting was the way they looked at each other and the way they looked at the crowd?

A. Yes, sir.

Q. Now, is that true?

A. Yes, sir. (Tr. pp. 126-128.)

Testimony of John Parrish, for Defendant Morrison.

JOHN PARRISH, called as a witness on behalf of the defendant, Morrison, being first duly sworn, testified as follows:

I reside at the Rialto Hotel, Sutter Street. I have been a resident of San Francisco since I came back overseas last June. I served in the World's War in the capacity as Sergeant of the Canadian Army. I was discharged in May, 1920. I have been in the service of the Techau Company fifteen years previous to my service overseas. On my return here I regained my old position. It was kept open for me. I know Mr. Morrison the defendant here and Mr. Lardi the codefendant. I was in the courtroom Friday afternoon when a man named Pinckel, *alias* Belmont was pointed out.

Q. Were you in the Tavern performing your usual duties on the 30th day of July and the 31st of July, 1921?

A. Yes, sir, the last Saturday in July I was.

Q. Did you have occasion to observe there the parties calling themselves Mr. and Mrs. Belmont?

(Testimony of John Parrish.)

A. Yes, sir, I met them at the door and seated them.

Q. Won't you please tell the jury, in your own way, what conversation you had with them and what you observed?

A. Yes, sir, that night, about ten minutes of eight, I was on duty at the door, a man and woman came to the door and I saw them hesitate and I said, "How many in your party?" They said, "Two, a reservation for Mr. Belmont." "Oh," I said, "The reservation is somewhat delayed" and I said, "We have had to give the table away, quite a rush," but [113] I said, "If you will be seated here, I will take care of you until I can get you another table." They sat there a few minutes and we were kind of busy, and I went to them to try to get their order and I said, "Have you ordered yet?" They said "No, have you got that other table?" I said, "No, I have not." They said, "How about a little drink?" I said, "I don't understand what you mean about a drink," I looked them over for a minute and I kind of thought they were under the influence of liquor, and I went to the head waiter then, I said, "There is a party there named Belmont, they want a ringside table, I think they do not look to me as if they need it, they should be back in the house somewhere." He said, "All right, I will look them over." So, he came around and I said, "What do you think about it?" I said "I think they have been drinking."

(Testimony of John Parrish.)

A. I was talking to Mr. Brown, the head waiter, he said, "I think they have been drinking, what do you think about it?" I said, "Well, that is it," that is what we came to the conclusion, that they were under the influence of liquor, the man I thought more than the woman, the woman never said anything to me, but eventually they were moved to another location but not very prominent, in the rear of the house.

Mr. SCHLESINGER.—Q. Did you see any drinks served to them that night?

A. No, sir, I never saw them.

Q. Or any other night? A. No, sir.

Q. Who is it that takes the orders in Techau and does the serving?

A. Well, usually the captain, and turns it over to the waiter and supervises the serving to see that they get service.

Q. Was Lardi in the habit of serving?

A. Just the same capacity as myself, serving meals, as far as I know of.

Q. Did you see Lardi serving that night?

A. No, my jurisdiction [114] was by the door, and I did not pay much attention to the tables at that end of the room.

Q. What was the condition of the dining-room as to being crowded or otherwise on those occasions?

A. Well, Saturday night it is usually—it was fairly well crowded, and as a matter of fact, we had not another table, the only table that was left

(Testimony of John Parrish.)

for the Belmont people was a little one at the desk.

Q. Will you please tell the jury, in a word, how the tables are covered with cloth, how far down the cloth extends?

A. Well, they are pretty well to the floor, I think, yes, usually to the floor. (Tr. pp. 128-131.)

On cross-examination the witness testified as follows:

I met them at the door. I was in here when Mr. Rinckel was on the witness-stand and I was one of the persons who stood up here. I noticed him, I called Mr. Wall's attention to him; I said, "This is Mr. Belmont," immediately I saw him I knew him. I knew him right away. Well, that is one of the things that we usually are adept at, is remembering faces. I had never seen him before. I have never seen Miss Simpson, only on that night. They were the two persons that came in now known as Mr. Rinckel and Miss Simpson. I was at the door when they arrived and I seated him. I took them to a little table right beside the door. I spoke first. I said, "How many in your party?" They said, "A reservation for Mr. Belmont." I told them they were kind of late for their reservation, I understood that that reservation—as a matter of fact, I put it in the book seven o'clock, but it was about ten minutes of eight when they arrived after postponing it once over the telephone. Never in my life, to my knowledge, had I seen those people before. I put them on the reservation book [115] because the

(Testimony of John Parrish.)

reservation was called over the telephone, any person that calls for reservation and gives their name we put it in the book, naturally, to take care of it. I was called to the telephone, after they had postponed their reservation the first time, but I believe there was someone else standing at the telephone. I wrote the name in the book "Belmont." I got it from the person who was at the telephone taking reservations. I cannot remember who it was now, one of the captains, I don't know which. The reservation must have been made around seven, Saturday night, between seven and the time they arrived, I couldn't swear to the time because there was no immediate reason to pay any attention to it, only that it was a reservation. My best judgment was that it was about seven o'clock and I marked it on the book. They were to arrive at seven-thirty. It was ten minutes of eight when I met them at the door. There was a reservation made, I do not make the reservation, I enter it into the book, and Mr. Brown, the head waiter, assigns them to a certain table. He assigned them to a certain table. I do not know the number of the table. It was a ringside table, I believe, that they were assigned to, or something down near the end of the room. I seated them at another table. After a few minutes I saw there was no one went to them to take their order and I went to them and asked them, "Did they order?" They said they had not done so. I said, "Could I take it for you?" "Well," they said,

(Testimony of John Parrish.)

“What about this other table?” I said, “Well, there is not one.” so they said, “How about a little drink.” Well, I kind of laughed and walked away from them, saw Mr. Brown and told him about the party, the Belmont party was in, you know, I thought they were kind of under the influence of liquor and I did not think that they should have a table anywhere prominent. So he [116] said, “Well, I will look them over,” so he did. After that it was out of my hands altogether, and I had nothing further to do with it. I did not observe them any further during the evening at all.

Q. What was it that made you think they were intoxicated, what particular thing now makes you think they were intoxicated, and so state on the witness-stand?

A. Well, their actions, for one thing.

Q. Tell us what actions you observed?

A. Facial expressions.

Q. And what else?

A. I was not close enough to smell their breath, I figured in my way of thinking, of course, I may be different than anybody else, but I can tell whether people are intoxicated or partially having handled people for twenty years in this business.

Q. I suppose I can when I see a man drunk and he weaves and staggers?

A. There was no staggering about it.

Q. Is there anything else that causes you to

(Testimony of John Parrish.)

say at this time that they were intoxicated than what you stated?

A. I figured their asking for a drink, that is one of the things that made me think so.

Q. What else made you think they were intoxicated? A. I have no other reason.

Q. Nothing else, is there? A. No.

Q. Nothing at all? A. No. (Tr. pp. 131 to 135.)

**Testimony of John Parrish, for the Government
(Recalled).**

JOHN PARRISH, recalled by the United States, testified as follows:

Mr. GEIS.—Q. Mr. Parrish, when Mr. Rinckel and Miss Simpson, with the name, as you say, of Belmont, came in, do you recall that they asked you for Mr. Lardi? A. No, sir. [117]

Q. Well, will you say they did not?

A. They did not.

Q. Who did they ask for?

A. They did not ask for any person.

Q. Then, when they were seated at the table, the first table, who took them over to the other table?

A. Well, that I don't know, sir.

Q. You don't know who did that?

A. I don't know who did that, I remember going out of the room for an order and when I came back I noticed that they were not there and they had been moved.

(Testimony of John Parrish.)

Q. You don't know who took them over to the other place?

A. I couldn't say, sir, I don't know. (Tr. p. 135.)

Testimony of Miss Daisy Simpson, for the Government (Recalled in Rebuttal).

Miss DAISY SIMPSON, recalled by the United States in rebuttal, testified as follows:

Mr. GEIS.—Q. At the time when you arrived at Techau Tavern on the evening of the 30th, did you meet some one at the door?

A. Yes, we met a man at the door, and we asked for Mr. Lardi, telling him that we had telephoned and made a reservation.

Q. Then you were seated, as I understand it, at a table?

A. Yes, we were seated at a table to the right of the entrance, a two chair table.

Q. I believe you heretofore testified that Mr. Lardi took you over to the other table?

A. Yes, well then, Mr. Lardi came to us and took us to a table at the south end of the dining-room. (Tr. p. 136.)

Testimony of A. S. Rinckel, for the Government (Recalled in Rebuttal).

A. S. RINCKEL, recalled by the United States, in rebuttal, testified as follows:

Mr. GEIS.—Q. Mr. Rinckel, at the time you arrived at [118] Techau Tavern on the evening

(Testimony of A. S. Rinckel.)

of the 30th of July, 1921, you met some one at the door, did you not? A. Yes, sir.

Q. What, if anything, did you say to him, or did you ask for anybody?

A. I asked for Mr. Lardi. (Tr. p. 136.)

When the above-entitled cause was called for trial, and after the impanelment of the jury, and before any testimony was taken, and before any evidence was offered or introduced in said cause, the defendants Albert C. Morrison and V. E. Lardi, by their counsel, in open court, then and there served and filed their written objections, and argued said objections to the introduction in evidence of that certain property, and each and every article thereof, described in a certain inventory attached to an alleged search-warrant issued on the 30th day of July, 1921, by Albert M. Hardi, United States Commissioner for the Northern District of California, and which property had been seized by virtue of said alleged search-warrant. That said alleged search-warrant was based upon certain alleged affidavits of D. W. Rinckel and A. S. Rinckel, and addressed to the United States Prohibition Enforcement Officer, and to his deputies.

The said alleged search-warrant, supporting affidavits and inventory attached thereto as aforesaid, are in the words and figures, as follows:
[119]

United States of America,
Northern District of California,
County of Alameda,—ss.

On this 30th day of July, 1921, before Albert M. Hardie a United States Commissioner in and for the Northern District of California, personally appeared this day A. S. Rinckel who being first duly sworn, deposes and says:

That on the 29th day of July 1921, he purchased at Techau Tavern, 247 Powell Street, San Francisco, California, two gin cocktails, four Scotch whiskey highballs and two Loganberry cocktails and that he paid for said intoxicating liquor the sum of \$9.27.

That affiant states that in and upon the afore-said premises and since Title II of the said Act went into effect, to wit, after February 1, 1920, intoxicating liquor, to wit: alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and any spirituous, vinous, malt and fermented liquor, liquids, and compounds, medicated, proprietary, patented, containing one-half of 1 per centum or more of alcohol by volume and fit for use for beverage purposes, was and now is, kept, sold, possessed and bartered, in violation of Title II of the said National Prohibition Act, and particularly in violation of Sections 3 and 21 of said Title II.

A. S. RINCKEL.

Subscribed and sworn to before me this 30th day of July, 1921.

ALBERT M. HARDIE,
United States Commissioner, Northern District of
California.

I hereby certify this to be a full copy of an original affidavit on file in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this 27th day of October, A. D. 1921.

[Seal] ALBERT M. HARDIE,
United States Commissioner, Northern District of
California. [120]

United States of America,
Northern District of California,
County of Alameda.—ss.

On this 30th day of July, 1921, before me Albert M. Hardie, a United States Commissioner in and for the Northern District of California, personally appeared this day D. W. Rinckel who being first duly sworn, deposes and says:

That he is and at all times herein mentioned was a Federal Prohibition Agent in and for the Northern District of California, and as such makes this affidavit and presents the facts and circumstances and conditions hereinafter set out that heretofore came to knowledge of and as ascertained by affiant for the purpose of having issued hereon and hereunder a search-warrant under and pursuant to the provisions of Title II, of the National Prohibition Act, representing the issuance of search-warrants,

to search the following described premises, to wit: Techau Tavern at 247 Powell Street, City and County of San Francisco, State of California, including dining-rooms, booths, kitchen, basement, lockers, closets, safes, office, outbuildings, being entire premises with outbuildings, attached and connected thereto.

That affiant states that in and upon the aforesaid premises and since Title II of the said Act went into effect, to wit, after February 1, 1920, intoxicating liquor, to wit: alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and other spirituous, vinous, malt, and fermented liquor, liquids, and compounds, medicated, proprietary, patented, containing one-half of one percentum or more of alcohol by volume which are fit for use for beverage purposes, was and now is, kept, sold, possessed and bartered, in violation of Title II of the said National Prohibition Act, and particularly in violation of Section 21 of said Title II. That this affidavit is based upon the affidavit hereto attached and which is made a part hereof.

That it will be necessary to search the said premises in order to secure the said intoxicating liquor for the United States Government and that it will be impossible to secure the aforesaid intoxicating liquor without the aid and use of a search-warrant.

WHEREFORE affiant prays that a warrant to enter the said premises and there to search for the said intoxicating liquor be issued pursuant to the statute in such cases made and provided.

D. W. RINCKEL.

Subscribed and sworn to before me this 30th day of July, 1921.

[Seal] ALBERT M. HARDIE,
United States Commissioner, Northern District of
California.

I hereby certify this to be a full copy of an original affidavit on file in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this 27th day of October, A. D. 1921.

ALBERT M. HARDIE,
United States Commissioner, Northern District of
California. [121]

The President of the United States of America to
The United States Prohibition Enforcement
Supervisors and to His Deputies, or Any or
Either of Them, GREETING:

WHEREAS, D. W. Rinckel has heretofore, to wit, on the 30th day of July, 1921, filed with me, ALBERT M. HARDIE, a United States Commissioner for the Northern District of California, at Oakland, his affidavit in which he states that he is and at all times therein mentioned was, a Federal Prohibition Agent for the Pacific Division, and as such, makes his affidavit and presents the facts, circumstances and conditions hereinafter set out that theretofore came to the knowledge of, and as ascertained by him for the purpose of having issued thereon and thereunder a search-warrant under and pursuant to the provisions of Title II of the Act of Congress of October 28, 1919, to wit, the

National Prohibition Act respecting the issuance of search-warrants, to search the following described premises, to wit, Techau Tavern, at 247 Powell Street, City and County of San Francisco, State of California, including dining-rooms, booths, kitchen, basement, lockers, closets, safes, office, outbuildings, being entire premises with outbuildings attached and connected thereto.

That affiant states that in and upon the aforesaid premises and since Title II of the said Act went into effect, to wit, after February 1, 1920, intoxicating liquor, to wit, alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and other spirituous, vinous, malt, and fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, containing one-half of 1 percentum or more of alcohol by volume which are fit for use for beverage purposes, was and now is kept, sold, possessed, and bartered, in violation of Title II of said National Prohibition Act and particularly in violation of Section 21 of said Title II.

That it will be necessary to search the said premises in order to secure the said intoxicating liquor for the United States Government, and it will be impossible to secure the aforesaid intoxicating liquor without the aid and use of a search-warrant; whereupon affiant prays that a search-warrant issue;

NOW, THEREFORE, pursuant to Section 25, Title II of the Act of October 28, 1919, known as the National Prohibition Act, you are hereby authorized and empowered to enter said premises

hereinabove described, and each and every building on said premises, in the day or night-time, and thoroughly to search for the said intoxicating liquor which is concealed in violation of said Act of October 28, 1919, and to seize the same and take it into your possession to the end that the same may be dealt with according to law, and hereof to make due return with a written inventory of the property taken by you or either of you without delay.

WITNESS my hand this 30th day of July, 1921.

[Seal]

ALBERT M. HARDIE,

United States Commissioner, Northern District of
California. [122]

INVENTORY OF PROPERTY SEIZED BY
VIRTUE OF WITHIN SEARCH-WAR-
RANT.

- 1 1/4-Gal. Bottle Port Wine, contained about 4 ounces.
- 1 1/4-Gal. Bottle Whisky, containing about 2 ounces.
- 1 1/4-Gal. Bottle Wine, full.
- 1 1/4-Gal. Bottle Unknown liquor.
- 1 Pint Bottle Whisky, nearly full.
- 1 Pint Bottle 1/3 full.
- 1 Pint Bottle Gin and water full.
- 1 Pint Bottle Whisky, 1/4 full.
- 1 Pint Bottle Containing drinks taken from table, (liquor unknown).
- 1 Pint Bottle with Doctors Prescription taken from table (Whisky).
- 1 Pint Bottle Whisky 1/2 full.
- 1 Pint Bottle Whisky 1/4 full.

1 Pint Bottle Containing Highballs.

1 1/2-pt. Bottle Containing Highballs.

3 Pints Unknown Liquor.

I. H. M. Kupser, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant.

July 30, 1921.

H. M. KUPSER.

Subscribed and sworn to before me this 4th day of August, 1921.

[Seal]

ALBERT M. HARDIE,

United States Commissioner, Northern District of California.

United States District Court. No. 9720. U. S. vs. Morrison et al. Deft. Exhibit, Re Motion to Exclude Evidence. Filed Oct. 28, 1921. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [123]

Said written objection served, filed and argued as aforesaid, are in the words and figures as follows, viz:

“In the Southern Division of the District Court of the United States in and for the Northern District of California.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERT C. MORRISON, V. E. LARDI, RICH-
ARD BUCKING and JOHN ANTONETTI,
Defendants.

NOTICE OF OBJECTION.

TO E. FORREST MITCHELL, United States Prohibition Enforcement Supervisor, D. W. Rinckel, Prohibition Enforcement Agent; and to the United States Attorney in and for the Northern District of California, and Robert H. McCormack, Special Assistant to the Attorney General of the United States.

We hereby notify you and each of you that the defendants and each of them intend to object, and will object, to the introduction in evidence of that certain property, and each and every article thereof, described in a certain inventory attached to an alleged search-warrant issued on the 30th day of July, 1921, by Albert M. Hardie, United States Commissioner for the Northern District of California, and based on certain alleged affidavits of D. W. Rinckel and A. S. Rinckel, and which said search-warrant is addressed to the United States Prohibition Enforcement Supervisor, and to his deputies, or any or either of them.

Said objection will be made upon the grounds that the search-warrant under which said property was taken was and is void in the following particulars:

(1) The supporting affidavits are based on information and belief.

(2) That the particular affidavit under which said search-warrant was issued is based upon information received from another person, and was not based upon the personal knowledge of the affiant.

(3) That both the affidavit and search-warrant failed to name a known defendant, and there is no averment in the affidavit setting forth that any one was about to commit any crime against the laws of the United States, or was using the property or about to use the property or premises for the commission of any felony.

(4) That said search-warrant does not show probable cause and is not supported by affidavit naming or describing any particular person or persons.

(5) That said search-warrant is in violation of the Fourth and Fifth Amendments to the Federal Constitution, and is also in violation of the provisions of the Volstead Act. [124]

(6) That said property was seized and taken by the Prohibition Enforcement Supervisor and Prohibition Enforcement Agent, hereinbefore referred to, without any lawful warrant of any kind and without the consent of the defendants, or any of them, and it is the intention of the Government Officials to introduce the same in evidence against the defendants.

(7) That said property was taken solely under the search-warrant heretofore referred to.

Dated: October 28, 1921.

BERT SCHLESINGER,

THOS. L. LENNON,

Attorneys for Defendants."

That said objections were overruled by the Court, to which ruling of the Court the defendants Albert

C. Morrison and V. E. Lardi, then and there in open court duly excepted.

That the Court gave the following charge and instructions to the jury.

“INSTRUCTIONS.

By The COURT.—Gentlemen: The defendants, Morrison and Lardi, are on trial before you under an information charging them, jointly with two others who are not on trial, in four counts with certain violations of the National Prohibition Law. The first count charges that they maintained a nuisance at Teehau Tavern, in that they kept there, wilfully and unlawfully, certain intoxicating liquors, to wit: gin, whiskey, port wine and red wine. This is averred to have been committed on the 30th day of July of this year.

The second count charges that, at the same time and place, they violated the Act in having this same liquor in their possession at this place.

A third count charges them with having violated the law on the 29th of July, in that they did sell certain intoxicating liquors, to wit: two gin cocktails, two loganberry highballs and four Scotch whiskey highballs.

And a fourth count charges them with having violated the law, in that they did sell, at the same place on the 30th day of July, two gin cocktails, and two whiskey highballs.

Now, of course, it is idle for me to say to you gentlemen that there is considerable question, throughout some sections of the country, as to the advisability of having adopted the Eighteenth

Amendment and the consequent legislation, but the Amendment was adopted, and it is part of the Constitution. And the Prohibition Law was enacted, and it has been tested out before the Supreme Court of the United States, and it is now the law of the land, and it is equally your duty, with mine, to enforce this law whenever it is violated, whether we are in sympathy with it, or its purposes, or not. [125]

There are certain short provisions of the law which I will call to your attention for your application to the present case. The word "intoxicating liquor" is defined in section 1 of Title 2 of the Act as follows:

"It shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter and wine, and, in addition thereto, any spirituous, vinous, malt or fermented liquor, liquids and compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing one-half of one percentum or more of alcohol by volume, which are fit for use for beverage purposes."

Section 3 provides that,

"No person shall, on or before the date the Eighteenth Amendment to the Constitution of the United States goes into effect"—which was in January, 1920,—"manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor," except as authorized in the Act.

And section 21 provides,

“Any room, house, building, boat, vehicle, structure or place where intoxicating liquor is manufactured, sold, kept or bartered in violation of this Title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor.”

That is what is meant by the “nuisance” that is charged in the information.

Now, these are the provisions of the law which you are to apply to the facts that have been laid before you. Of course, the law is to be submitted to you by the Court. You are to take the law as the Court expounds it, whether right or wrong, and not what you believe the law ought to be, or, really, what you believe the law is. If the Court gives a wrong definition of the law, of course, there is a remedy in another tribunal.

But the facts are matters for the jury. The credibility of the witnesses, the facts that are proved, and whether the facts proven constitute violations of the law, as the Court lays it down, are matters for the jury to determine, and the jury is just as free from influence by the Court in finding the facts, and the Court desires always to be just as far from attempting to influence the jury in their determination of the facts as the Court is sensitive in having the jury accept from its declaration of the law.

With this understanding of our several duties,

I will now call your attention to the fact that there is some direct testimony in this case tending to show that the defendant Lardi did sell liquor on the various occasions. If you believe that to be established beyond a reasonable doubt, of course he is guilty at least of selling the liquor as charged. If you believe that he had it in his possession at this place for the purpose of sale, then he is guilty of maintaining the nuisance as charged. [126]

Now, there is another provision of the law. It is not charged that the defendant Morrison himself made the sales, though there is some suggestion that he was present and acquiesced in that, at least, and I want to call your attention to this provision of the Criminal Code: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission is a principal." And if you should find that the law was being violated there, and, from all the evidence in the case, that the law was violated there on the evening of the 30th, and that a nuisance was maintained by somebody, and if you find that the defendant Morrison, in the language of the statute, either aided, abetted, counseled, commanded, induced or procured its commission, even if he did not himself commit it, he, of course, is a principal, and is chargeable and guilty as such.

Now, there are certain circumstances under which liquor may be lawfully possessed, but the burden of proof that such liquor was lawfully acquired and possessed is upon the possessor, and

no attempt has been made to prove that the liquor in question here was lawfully possessed by the person possessing them, whoever such person may have been. If you find, from the evidence, that such liquor was possessed by the defendants, or either of them, you are at liberty to find that such possession was unlawful because unexplained.

But even if you find it to be a fact that the liquors referred to in the indictment were sold on the premises described in the indictment, yet neither of the defendants can be convicted, unless you find from the evidence, beyond a reasonable doubt, that such defendant aided and abetted in such sale or sales, or that he made it himself. The mere fact, if it be a fact, that either of the defendants were present at the time the liquors referred to in the indictment were sold on the premises described would not be sufficient to convict such defendant, unless you find, from the evidence, beyond a reasonable doubt, that he participated in such sales. But if a defendant is in charge of the establishment there, and is present and sees a sale made, the jury will bear that fact in consideration, if they find it to be a fact, in determining whether such defendant either counseled, or commanded, or induced, or procured, or aided in the sale.

Now mere knowledge of the sale of liquor, without participation in such sale, is not sufficient, but participation—such participation as I have defined to you by aiding, abetting, counseling, commanding, inducing or procuring the sale, is necessary for conviction. Where an alleged sale of intoxicating

liquor is in violation of the law, there is a presumption that defendants did not make the sale. That is the usual presumption of innocence, and the Government must prove the sale, beyond a reasonable doubt, and in considering the question of the guilt or innocence of the defendants on trial, you are not to take into consideration the fact that two other defendants have entered pleas of "guilty." This fact cannot be used to the prejudice of the remaining defendants now on trial, or be considered by you in any way.

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, the character of his testimony, or by evidence affecting his [127] character for truth, honesty or integrity, his motives, or by contradictory evidence. The jury are the exclusive judges of the credibility of witnesses. If you find that any witness has sworn falsely upon any material matter in the case, you have the right to reject the whole of his testimony, except in so far as it is corroborated by other credible evidence. The credit of the testimony is left to the jury who are the judges of the probability, the improbability, the credibility or incredibility of the witnesses testimony. The credit due to his testimony is to be measured, in part, by his interest or possible interest which may sway or pervert the truth, and by his manner in the courtroom in delivering his testimony, and the jury, in weighing the testimony of the witness, has a right to consider the probability of the matter related by him. Where a witness,

otherwise unimpeached, is testifying under circumstances calculated to create a strong bias, and states what, in its nature, is incredible, his testimony, of course, is not necessarily to be believed. In weighing and considering the testimony which has been introduced in this case you are entitled to consider and it is your duty to consider the extent to which the witnesses are interested, either pecuniarily or otherwise.

It is a rule of law, of course, that no man can be found guilty on suspicion, no matter how strong that may be. But such evidence as shows his guilt beyond a reasonable doubt is sufficient to warrant a conviction. In this case, as in every other, the defendants are presumed to be innocent, and the burden of proving their guilt rests upon the Government, and if the Government has failed to overcome such presumption of innocence in this particular case, your verdict should be "not guilty." The presumption of innocence attaches at the beginning of the trial and remains with the defendants, and each of them, throughout the trial and until by your verdict, you have otherwise determined, if you should so determine, and you should not so determine unless you are satisfied, from the evidence, of the guilt of such defendant beyond a reasonable doubt. A reasonable doubt is defined to be that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jury in that condition that they cannot say that they have an abiding conviction, to a moral certainty, of the truth

of the charge. It is, in fact, such doubt as a reasonable man may honestly entertain after a fair consideration of all the evidence. If you have such reasonable doubt as to the guilt of the defendants, or either of them, it is your duty to give such defendant the benefit of that doubt. If you have no such reasonable doubt of the guilt of the defendants, or either of them, it is equally your duty to convict.

The mere keeping of liquor itself is not a common nuisance, although its possession may be unlawful, but such keeping must be for the purpose of sale or barter. An employer cannot be held responsible for the acts of his employee or servant unless he authorizes or participates in the same.

You may find both defendants guilty, if the facts, in your judgment, warrant it; you may find both of them not guilty if there is any reasonable doubt of their guilt; or you may find one defendant guilty and the other not guilty if, on your consideration of all the facts of the case, you find that such verdict is warranted under the instructions that I have given you. [128]

That the defendant Morrison requested the Court to give his instruction No. 17, which instruction is as follows:

“INSTRUCTION No. 17.

“I direct you to return a verdict of not guilty as to the defendant Albert Morrison, upon the ground that there is not sufficient evidence to warrant a submission to the jury.”

That the Court refused to give said instruction to

which refusal the defendant then and there noted an exception.

That after the Court had completed its charge to the jury, the jury retired to deliberate upon its verdict and thereafter brought in a verdict as follows:

“In the Southern Division of the United States District Court for the Northern District of California, First Division.

We, the jury find as to the defendants at the bar as follows:

Albert C. Morrison guilty on 1st and 2nd counts.

V. E. Lardi guilty on 3d and 4th counts.

ROBERT S. ATKINS,
Foreman.”

[Endorsed]: No. 9720. Verdict. Filed 9 o'clock & 40 mi. P. M. October 31st, 1921. Walter B. Maling, Clerk. Lyle S. Morris, Deputy Clerk.”

Thereupon the Court fixed Tuesday, November 4, 1921, at the hour of 10 o'clock A. M. as the date and time for the imposition, sentence and judgment, at which time all of the defendants were present in open court.

Whereupon counsel for the defendants Albert C. Morrison and V. E. Lardi made, served and filed the following written motions for arrest of judgment: [129]

“In the Southern Division of the United States District Court for the Northern District of California, First Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERT C. MORRISON et al.,

Defendants.

MOTION IN ARREST OF JUDGMENT.

Now comes Albert C. Morrison, one of the defendants in the above-entitled action, and against whom a verdict of guilty was rendered on the 31st day of October, 1921, on the first and second counts of the information filed herein, and moves the Court to arrest the judgment against said defendant on said counts, and hold for naught the verdict of guilty rendered against him for the following reasons:

1. That the first count of said information does not charge any offense against the laws of the United States, nor does it charge said defendant with the doing of anything the doing of which is forbidden by any of the laws of the United States.

2. That the said first count of said information is fatally defective and void in that:

- (a) It fails to set forth every element of the offense intended to be charged.

- (b) It does not set forth the alleged offenses in the language of the statute, or equivalent language.

(c) It does not set forth any facts sufficient in law to support a conviction.

(d) There is no fact or circumstance stated therein to advise the Court that an offense has been committed against the laws of the United States.

3. That the said first count of said information is lacking in the essential elements to constitute the offense sought to be charged.

4. That section 21 of Title II of the National Prohibition Act, this being the section under which the said first count of said information is based, (omitting the immaterial portions) is as follows:

“Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered *in violation of this title*, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall [130] be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000 or be imprisoned for not more than one year, or both. * * * ”

The first count of said information, and the whole thereof, is as follows, to wit:

“That Albert C. Morrison, V. E. Lardi, Richard Bucking and John Antonetti, hereinafter called the defendants heretofore, to wit: on or about the 30th day of July, 1921, at and in ‘Techau Tavern’ 247 Powell Street in the City and County of San Francisco, in the Southern Division of the Northern District of

California, and within the jurisdiction of this court, then and there being, did then and there wilfully and unlawfully maintain a common nuisance in that the said defendant did then and there wilfully and unlawfully keep on the premises at and in 'Techau Tavern,' 247 Powell Street, City and County of San Francisco, aforesaid, certain intoxicating liquor, to-wit: gin, whisky, port wine and red wine, all of said intoxicating liquors, then and there containing one half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the keeping of the said intoxicating liquor by the said defendant at the time and place aforesaid, was then and there prohibited, unlawful and in violation of section 21 of title II of the Act of Congress of October 28, 1919, to wit: The National Prohibition Act.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided."

That the said first count of said information fails to charge that the liquor referred to therein, was kept in violation of title II, or that it was kept for purposes of sale, or for other commercial purposes, or for any unlawful purpose.

5. That it is not averred or claimed in the first count of said information that the liquor referred to therein was kept in violation of provisions of title II as section 21 requires.

6. That section 21 referred to in the first count of said information that the liquors referred to intoxicating liquor in any house or building or place where it is so kept "in violation of" title II of the National Prohibition Act; that there is no averment of any kind or character in the first count of said information that the liquors referred to therein were kept in violation of title II, or for manufacture, sale, barter, transport, or export, or without a permit, or for any other unlawful purpose.

7. That the first count of said information fails to state facts sufficient to constitute the offense of willful or unlawful maintaining a common nuisance under the Act of Congress of October 28, 1919; namely, the National Prohibition Act.

8. That this defendant has been convicted on the first count of said information without due process of law and in violation of Articles V and VI of the Constitution of the United States of America. [131]

9. That the second count of said information does not state facts sufficient to constitute an offense against the laws of the United States.

10. That the second count of said information does not state facts sufficient to constitute an offense against the laws of the United States, in this:

(a) That there is no averment that the possession of the intoxicating liquors referred to therein was for the purposes of sale, or for any of the purposes referred to in section 3 of title II of the Act of Congress of October 28, 1919.

(b) That it fails to set forth every element of the offense intended to be charged.

(c) That it does not set forth the alleged offense in the language of the statute, or equivalent language.

(d) That it does not set forth any facts sufficient in law to support a conviction.

11. That this defendant has been convicted on the second count of said information herein without due process of law and in violation of Articles V and VI of the Constitution of the United States.

WHEREFORE, this defendant prays that this motion be sustained, and that the judgment of conviction against him be arrested and held for naught, and that he have all such other orders as may be just and proper in the premises.

BERT SCHLESINGER,
C. W. DURBROW,
Attorneys for said Defendant.

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALBERT C. MORRISON, V. E. LARDI et al.,
Defendants.

MOTION IN ARREST OF JUDGMENT.

Now comes V. E. Lardi, one of the defendants in the above-entitled action, and against whom a verdict of guilty was rendered on the 31st day of October, 1921, on the third and fourth counts of the

information filed herein, and moves the Court to arrest the judgment against said defendant on said counts, and hold for naught [132] the verdict of guilty rendered against him for the following reasons:

1. That the said third and fourth counts of said information do not charge any offense against the laws of the United States, nor do they charge said defendant with the doing of anything the doing of which is forbidden by any of the laws of the United States.

2. That the said third and fourth counts of said information are fatally defective and void in that:

(a) They fail to set forth every element of the offense intended to be charged.

(b) They do not set forth any facts sufficient in law to support a conviction.

(c) There is no fact or circumstance stated therein to advise the Court that an offense has been committed against the laws of the United States.

3. That this defendant has been convicted on the said third and fourth counts of said information without due process of law and in violation of Articles V and VI of the Constitution of the United States of America.

WHEREFORE, this defendant prays that this motion be sustained, and that the judgment of conviction against him be arrested and held for naught, and that he have all such other orders as may be just and proper in the premises.

BERT SCHLESINGER,

C. W. DURBROW,

Attorneys for Said Defendant.

And said motions and each of them being denied, the said defendants and each of them then and there in open court duly excepted to the refusal of the Court to grant their respective motions in arrest of judgment.

Thereupon and in open Court the defendants Albert C. Morrison and V. E. Lardi, by their counsel, then made a motion for a new trial upon the ground of the insufficiency of the evidence to justify the conviction of the said defendant Albert C. Morrison, and the insufficiency of the evidence to justify the conviction of the defendant V. E. Lardi.

That said motion for new trial was denied by the Court to which order denying a new trial the defendants and each of them then and there in open Court duly excepted. [133]

Thereafter and on said 4th day of November, 1921, the following judgment on the verdict of guilty was made and entered by the Court, viz:

“In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 9720.

Convicted Viol. National Prohibition Act.

THE UNITED STATES OF AMERICA

vs.

ALBERT C. MORRISON and V. E. LARDI.

JUDGMENT ON VERDICT OF GUILTY (MORRISON COUNTS NOS. 1 and 2—LARDI COUNTS NOS. 3 and 4).

B. F. Geis, Assistant United States Attorney, and

the defendants with their counsel came into court. The defendants were duly informed by the Court of the nature of the Information filed on the 4th day of August, 1921, charging them with the crime of Violating the National Prohibition Act; of their arraignment and plea of Not Guilty; of their trial and the verdict of the Jury on the 31st day of October, 1921, to wit:

“We, the Jury, find as to the defendants at the bar as follows: Albert C. Morrison, guilty on 1st and 2nd Counts. V. E. Lardi, Guilty on 3rd and 4th Counts.

ROBERT S. ATKINS, Foreman.”

The defendants were then asked if they had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a Motion for New Trial and a Motion in Arrest of Judgment; thereupon the Court rendered its Judgment;

THAT, WHEREAS, the said Albert C. Morrison and V. E. Lardi having been duly convicted in this Court of the crime of Violating the National Prohibition Act;

IT IS THEREFORE ORDERED AND ADJUDGED that the said Albert C. Morrison be imprisoned for the period of six (6) months in the County Jail, County of San Francisco, California; that V. E. Lardi be imprisoned for the period of six (6) months in the County Jail, County of San Francisco, California.

Judgment entered this 4th day of November, A. D. 1921.

WALTER B. MALING,
Clerk.

By _____,
Deputy Clerk."

[Endorsed]: 9720. Morrison et al. Nov. 4, 1921. Entered in Vol.—, Judg. and Decrees, at page—— [134]

The foregoing contains all the proceedings that were had, and all the testimony that was taken and the evidence, oral and documentary, that was adduced at the trial of the above-entitled action.

WHEREFORE, in order that all the proceedings had upon the trial of the above-entitled cause may be preserved, the defendants propose the foregoing as a full and correct bill of exceptions of all the proceedings had, and of all the evidence adduced at the trial, by both the plaintiff and the defendants, and pray that the same may be settled and allowed as a bill of exceptions of such proceedings, to be used on appeal from the judgment herein.

Dated: December 21st, 1921.

BERT SCHLESINGER,
C. W. DURBROW,

Attorneys for Defendants Albert C. Morrison and
V. E. Lardi. [135]

In the Southern Division of the District Court of
the United States in and for the Northern
District of California, First Division.

No. 9720.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERT C. MORRISON, V. E. LARDI, RICH-
ARD BUCKING and JOHN ANTONETTI,
Defendants.

**Presentation of Bill of Exceptions and Notice
Thereof.**

The defendants Albert C. Morrison and V. E. Lardi hereby present the foregoing as their proposed bill of exceptions herein, and respectfully ask that the same may be allowed.

BERT SCHLESINGER,
C. W. DURBROW,

Attorneys for Defendants, Albert C. Morrison and
V. E. Lardi.

To ROBERT H. McCORMICK, Special Assistant
to the Attorney General of the United States,
and to John T. Williams, United States At-
torney, Northern District of California, At-
torneys for Plaintiff:

Sirs:

You will please take notice that the foregoing
constitutes and is the proposed bill of exceptions
of the defendants Albert C. Morrison and V. E.

Lardi in the above-entitled cause, and that said defendants will ask for the allowance of the same.

BERT SCHLESINGER,

C. W. DURBROW,

Attorneys for Said Defendants. [136]

In the Southern Division of the District Court of
the United States in and for the Northern
District of California, First Division.

No. 9720.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERT O. MORRISON, V. E. LARDI, RICH-
ARD BUCKING and JOHN ANTONETTI,
Defendants.

**Stipulation for Settlement and Allowance of Bill
of Exceptions, and Order Making Bill of Ex-
ceptions Part of the Records.**

It is hereby stipulated that the foregoing bill
of exceptions is correct, and that the same be
settled and allowed by the Court.

R. H. McCORMACK,

Sp. Asst. U. S. Atty.,

JOHN T. WILLIAMS,

U. S. Atty.,

F. J. SHERIDAN,

Asst. U. S. Atty.,

Attorneys for Plaintiff.

BERT SCHLESINGER,

C. W. DURBROW,

Attorneys for Said Defendants.

O. K.—BEN F. GEIS,
Asst. U. S. Atty.

This bill of exceptions having been duly presented to the Court and having been amended to correspond with the facts, is now signed and made a part of the records in this cause.

M. T. DOOLING,
Judge.

Dated: February 24th, 1922.

[Endorsed]: Receipt of a copy of the within is hereby admitted this 21st day of December, 1921.

ROBERT H. McCORMACK,
Attorney for Plaintiff.

Lodged Dec. 21, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Filed Feb. 24, 1922. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [137]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 9720.

UNITED STATES OF AMERICA.

vs.

MORRISON & LARDI.

Verdict.

We, the Jury, find as to the defendants at the bar as follows: Albert C. Morrison—guilty on the

1st and 2d counts; V. E. Lardi—guilty on 3d and 4th counts.

ROBERT S. ATKINS,
Foreman.

[Endorsed]: Filed Oct. 31, 1921, at 9 o'clock and 40 minutes P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [138]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 9720.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

ALBERT C. MORRISON et al.,
Defendants.

**Motion in Arrest of Judgment (Albert C.
Morrison).**

Now comes Albert C. Morrison, one of the defendants in the above-entitled action, and against whom a verdict of guilty was rendered on the 31st day of October, 1921, on the first and second counts of the information filed herein, and moves the Court to arrest the judgment against said defendant on said counts, and hold for naught the verdict of guilty rendered against him for the following reasons:

1. That the first count of said information does not charge any offense against the laws of the United States, nor does it charge said defendant with the doing of anything the doing of which is forbidden by any of the laws of the United States.

2. That the said first count of said information is fatally defective and void in that;

(a) It fails to set forth every element of the offense intended to be charged.

(b) It does not set forth the alleged offense in the language of the statute, or equivalent language.

(c) It does not set forth any facts sufficient in law to support a conviction. [139]

(d) There is no fact or circumstance stated therein to advise the Court that an offense has been committed against the laws of the United States.

3. That the said first count of said information is lacking in the essential elements to constitute the offense sought to be charged.

4. That section 21 of Title II of the National Prohibition Act, this being the section under which the said first count of said information is based (omitting the immaterial portions), is as follows:

“Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered *in violation of this title*, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a mis-

demeanor and upon conviction thereof shall be fined not more than \$1,000 or be imprisoned for not more than one year, or both. * * *

The first count of said information, and the whole thereof, is as follows, to wit:

“That Albert C. Morrison, V. E. Lardi, Richard Bucking and John Antonetti, hereinafter called the defendants heretofore, to wit: on or about the 30th day of July, 1921, at and in ‘Techau Tavern,’ 247 Powell Street in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, then and there being, did then and there willfully and unlawfully maintain a common nuisance in that the said defendant did then and there wilfully and unlawfully keep on the premises at and in ‘Techau Tavern, 247 Powell Street, City and County of San Francisco, aforesaid, certain intoxicating liquors, to wit: gin, whiskey, port wine and red wine, all of said intoxicating liquors. then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the keeping of the said intoxicating liquor by said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

Against the peace and dignity of the United

States of America and contrary to the form of the statute of the said United States of America in such case made and provided.” [140]

That the said first count of said information fails to charge that the liquor referred to therein was kept in violation of title II, or that it was kept for purposes of sale, or for other commercial purposes, or for any unlawful purpose.

5. That it is not averred or claimed in the first count of said information that the liquor referred to therein was kept in violation of provisions of title II as section 21 requires.

6. That section 21 referred to in the first count of said information, only makes it an offense to keep intoxicating liquor in any house *of* building or place where it is so kept “in violation of” title II of the National Prohibition Act; that there is no averment of any kind or character in the first count of said information that the liquors referred to therein were kept in violation of title II, or for manufacture, sale barter, transport, or export, or without a permit, or for any other unlawful purpose.

7. That the first count of said information fails to state facts sufficient to constitute the offense of willful or unlawful maintaining a common nuisance under the Act of Congress of October 28, 1919; namely, the National Prohibition Act.

8. That this defendant has been convicted on the first count of said information without due process of law and in violation of Articles V and

VI of the Constitution of the United States of America.

9. That the second count of said information does not state facts sufficient to constitute an offense against the laws of the United States.

10. That the second count of said information does not state facts sufficient to constitute an offense against the laws of the United States, in this: [141]

(a) That there is no averment that the possession of the intoxicating liquors referred to therein was for purposes of sale, or for any of the purposes referred to in section 3 of title II of the Act of Congress of October 28, 1919.

(b) That it fails to set forth every element of the offense intended to be charged.

(c) That it does not set forth the alleged offense in the language of the statute, or equivalent language.

(d) That it does not set forth any facts sufficient in law to support a conviction.

11. That this defendant has been convicted on the second count of said information herein without due process of law and in violation of Articles V and VI of the Constitution of the United States.

WHEREFORE, this defendant prays that this motion be sustained, and that the judgment of conviction against him be arrested and held for naught, and that he have all such other orders as may be just and proper in the premises.

BERT SCHLESINGER,
T. L. LENNON,
Attorneys for Said Defendant.

[Endorsed]: Filed Nov. 4, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [142]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 9720.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERT C. MORRISON, V. E. LARDI, etc.,
Defendants.

Motion in Arrest of Judgment (V. E. Lardi).

Now comes V. E. Lardi, one of the defendants in the above-entitled action, and against whom a verdict of guilty was rendered on the 31st day of October, 1921, on the third and fourth counts of the information filed herein, and moves the Court to arrest the judgment against said defendant on said counts, and hold for naught the verdict of guilty rendered against him for the following reasons:

1. That the said third and fourth counts of said information do not charge any offense against the laws of the United States, nor do they charge said defendant with the doing of anything the doing or which is forbidden by any of the laws of the United States.

2. That the said third and fourth counts of said

information are fatally defective and void in that:

(a) They fail to set forth every element of the offense intended to be charged.

(b) They do not set forth any facts sufficient in law to support a conviction.

(c) There is no fact or circumstance stated therein to advise the Court that an offense has been committed against the [143] laws of the United States.

3. That this defendant has been convicted on the said third and fourth counts of said information without due process of law and in violation of Articles V and VI of the Constitution of the United States of America.

WHEREFORE, this defendant prays that this motion be sustained, and that the judgment of conviction against him be arrested and held for naught, and that he have all such other orders as may be just and proper in the premises.

BERT SCHLESINGER,

T. L. LENNON,

Attorneys for Said Defendant.

[Endorsed]: Filed Nov. 4, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [144]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 4th day of

November, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 9720.

UNITED STATES OF AMERICA

vs.

ALBERT C. MORRISON et al.

**Minutes of Court—November 4, 1921—Judgment,
etc.**

This case came on regularly this day for pronouncing of judgment as to defendants, Albert C. Morrison, V. E. Lardi, Richard Bucking and John Antonetti. Said defendants were present in court; defendants Albert C. Morrison and V. E. Lardi being present with their attorney, Bert Schlesinger, Esq., B. F. Geis, Esq., Asst. U. S. Dist. Atty., and R. H. McCormack, Esq., Special Asst. U. S. Atty. General, were present for and on behalf of the United States.

Defendants were called for judgment, duly informed of their arraignment, pleas, and the verdict of the jury, and asked if they had any legal cause to show why judgment should not be entered herein and

Thereupon Mr. Schlesinger, on behalf of defendants Albert C. Morrison and V. E. Lardi, presented and filed a Motion in Arrest of Judgment and, after hearing him, the Court ordered said motion denied and to which order exception was duly en-

tered. Mr. Schlesinger then moved the Court for order allowing said defendants a new trial herein and the Court likewise ordered said motion denied and to which order exception was duly entered.

No sufficient cause being shown or appearing why judgment should not be pronounced, the Court ordered that defendants [145] Albert C. Morrison and V. E. Lardi, for the offense of which they stand convicted, each be imprisoned for a period of six (6) months, and that defendants Richard Bucking and John Antonetti, for the offense of which they stand convicted, each be imprisoned for the period of four (4) months. Further ordered that said terms of imprisonment be executed upon said defendants by imprisonment in the County Jail of the County of San Francisco, State of California. Further ordered that each of said defendants stand committed to the custody of the U. S. Marshal to execute said judgments of imprisonment, and that commitments issue. On motion of Mr. Schlesinger, the Court ordered that execution of said judgment be and the same is hereby stayed for period of ten (10) days as to each defendant and that each defendant give bond in the sum of \$1000.00 for his appearance herein pending stay of execution, and that said defendants have until Nov. 8, 1921, to give and file such bonds.

Further ordered that bonds for appearance of defendants, pending appeal from aforesaid judgment, be and the same are hereby fixed in sum of \$4000.00, each. [146]

In the Southern Division of the United States District Court for the Northern District of California, First Division. No. 9720.

Convicted Viol. National Prohibition Act.

THE UNITED STATES OF AMERICA

vs.

ALBERT C. MORRISON and V. E. LARDI.

Judgment on Verdict of Guilty (Morrison Counts Nos. 1 and 2—Lardi Counts Nos. 3 and 4).

B. F. Geis, Esq., Assistant United States Attorney and the defendants with their counsel came into court. The defendants were duly informed by the Court of the nature of the information filed on the 4th day of August, 1921, charging him with the crime of violating the National Prohibition Act; of their arraignment and plea of Not Guilty; of their trial and the verdict of the Jury on the 31st day of October, 1921, to wit: "We, the Jury, find as to defendants at the bar as follows: Albert C. Morrison, Guilty on 1st and 2d Counts. V. E. Lardi, Guilty on 3d and 4th Counts. Robert S. Atkins, Foreman."

The defendants were then asked if they had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment:

THAT, WHEREAS, the said Albert C. Morrison and V. E. Lardi having been duly convicted in this Court of the crime of violating the National Prohibition Act;

IT IS THEREFORE ORDERED AND ADJUDGED that the said Albert C. Morrison be imprisoned for the period of six (6) months in [147] the County Jail, County of San Francisco, California; that V. E. Lardi be imprisoned for the period of six (6) months in the County Jail, County of San Francisco, California.

Judgment entered this 4th day of November, A. D. 1921.

WALTER B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

Entered in Vol. 11 Judg. and Decrees, at page 329. [148]

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALBERT C. MORRISON, V. E. LARDI, RICHARD BUCKING and JOHN ANTONETTI,
Defendants.

Petition for Writ of Error.

Now comes Albert C. Morrison and V. E. Lardi, two of the defendants in the above-entitled action, and bring this their petition for writ of error to the Southern Division of the District Court of the United States, for the Northern District of California, and in that behalf your petitioners show:

On the 4th day of November, 1921, there was made, rendered and entered in the above-entitled court and cause a judgment against your petitioners, wherein and whereby your petitioners, the said Albert C. Morrison and V. E. Lardi, were each adjudged and sentenced to imprisonment for the term of six months in the County Jail of the City and County of San Francisco, State of California; and your petitioners show that they are advised by counsel and they aver that there was and is manifest error in the records and proceedings had in said cause, and in the making, rendition and entry of said judgment, and sentence to the great injury and damage of your petitioner, all of which errors will be more fully made to appear by an examination of the said record [149] and by an examination of the bill of exceptions to be tendered and filed and in the assignments of errors presented herewith; and to that end thereafter that the said judgment, sentence and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioners now pray that a writ of error may be issued, directed therefrom to said Southern Division of the District

Court of the United States for the Northern District of California, returnable accordingly to law and the practice of the court, and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignment of errors, and all proceedings had in the said cause, that the same may be removed unto the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the errors, if any have happened may be duly corrected, and full and speedy justice done to your petitioners; and that during the pendency of this writ of error all proceedings in this court be suspended and stayed and that through the pendency of said writ of error the defendants Albert C. Morrison and V. E. Lardi be admitted to bail in the sum of Four Thousand Dollars (\$4,000) each.

Dated: November 8, 1921.

BERT SCHLESINGER,
C. W. DURBROW,
Attorneys for Petitioners.

Service of the within is hereby admitted this 8th day of November, 1921.

JOHN T. WILLIAMS.

[Endorsed]: Filed Nov. 8, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [150]

In the Southern Division of the District Court of
the United States in and for the Northern Dis-
trict of California, First Division.

No. 9720.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERT C. MORRISON, V. E. LARDI, RICH-
ARD BUCKING and JOHN ANTONETTI,
Defendants.

**Assignment of Errors on Behalf of Defendant
Albert C. Morrison.**

Albert C. Morrison, a defendant in the above-en-
titled cause, and one of the plaintiffs in error
herein, having petitioned for an order from said
Court permitting him to procure a writ of error to
this court directed from the United States Circuit
Court of Appeals for the Ninth Circuit, from the
judgment and sentence made and entered in said
cause against said Albert C. Morrison, one of the
plaintiffs in error herein, now makes and files with
said petition the following assignment of errors
herein upon which he will rely for a reversal of said
judgment and sentence upon the said writ, and
which errors and each and every of them are to the
great detriment, injury and prejudice of the said
Albert C. Morrison, and in violation of the rights
conferred upon him by law; and he says that in the

record and proceedings in the above-entitled action, upon the hearing and determination thereof in the Southern Division of the District Court of the United States for the Northern District of California, there is manifest error in this, to wit: [151]

1. That there was no evidence adduced and none appears in the record showing that the defendant Albert C. Morrison at any time or place maintained a common nuisance, or wilfully and unlawfully, or otherwise, kept on the premises at and in Techau Tavern, 247 Powell Street, San Francisco, California, or elsewhere, certain or any intoxicating liquors then and there containing one-half of one per cent or more of alcohol by volume, or otherwise, which was then and there fit for use for beverage purposes in violation of the Act of Congress of October 28, 1919, to wit: the National Prohibition Act, or in violation of any law whatever.

2. That the evidence adduced on the trial of said cause failed to show that the said Albert C. Morrison kept on the premises and in Techau Tavern, 247 Powell Street, San Francisco, any intoxicating liquor for the manufacture, sale, barter, transport, or export or for any unlawful purposes.

3. The evidence showed without contradiction that Techau Tavern is a corporation and has been engaged in the restaurant business in San Francisco for twenty years or thereabouts, and that its integrity has never before been questioned or attacked; that the defendant Albert C. Morrison is an employee, namely, the manager of said concern;

that the place was maintained by the corporation and not by the defendant.

4. The evidence indisputably shows that if any intoxicating liquor was kept or produced or sold in or upon said premises it was done so without the knowledge or consent of the said corporation or of this defendant.

5. That the evidence indisputably showed that when the prohibition officers upon the occasion mentioned in the information investigated the premises the place was filled with people, some four hundred fifty guests, and on one of the tables was found [152] a trifling quantity of alleged intoxicating liquor of which the defendant Albert C. Morrison had no knowledge whatever.

6. That the evidence is wholly insufficient to justify the judgment and sentence against the defendant Albert C. Morrison in that there was not a scintilla of evidence adduced, or which appears in the record, which shows, or tends to show, that the said Albert C. Morrison at any time in Techau Tavern, or elsewhere, kept, or possessed, or sold, or bartered, or gave away, or otherwise disposed of intoxicating liquors, in violation of the Act of October 28, 1921, to wit, the National Prohibition Act, or had knowledge of the same.

7. That the evidence showed that no money whatever was paid to the defendant Albert C. Morrison, and that he had no knowledge that any money had been paid, or was to be paid, for any intoxicating liquors in the premises known as Techau

Tavern in violation of said Act of Congress of October 28, 1919.

8. That the judgment and sentence as to this defendant is wholly unsustained by any evidence showing, or tending to show, that the said defendant ever maintained, or permitted to be maintained, a common nuisance on the premises at and in Techau Tavern by keeping on said premises intoxicating liquor for the purpose of manufacture, and or sale, barter, transport, and or export, or without a permit, or for any other unlawful purpose.

9. That said judgment and sentence as to the defendant Albert C. Morrison is invalid and contrary to law for the reason that the evidence and record indisputably shows that the defendant Albert C. Morrison did not, at any time or place or under any circumstances, keep on said premises, or possess, or sell, or manufacture, or barter, or transport, or export, or give away, or otherwise dispose of any intoxicating liquor in violation of the Act of [153] Congress of October 28, 1919, to wit; the National Prohibition Act, or in violation of any law of the United States.

10. That the evidence conclusively shows that any intoxicating liquor that was found in or upon said premises was trifling in amount and was brought there without the knowledge or consent of the said defendant Albert C. Morrison, or of the Techau Tavern.

11. That the judgment and sentence is against law.

12. That the judgment and sentence is opposed

to law in the particulars wherein we have showed the evidence to be insufficient to justify judgment and sentence as to the defendant Albert C. Morrison.

13. The Court erred in overruling the objection to the introduction in evidence of that certain property and each and every article thereof described in a certain inventory attached to an alleged search-warrant issued on the 30th day of July, 1921, by Albert M. Hardie, United States Commissioner for the Northern District of California, and based on certain alleged affidavits of D. W. Rinckel, and A. S. Rinckel, and which said search-warrant is addressed to the United States Prohibition Enforcement Supervisor and his deputies, or any or either of them, and which objections were made upon the grounds that the search-warrant under which said property was taken was and is void in the following particulars:

(1) The supporting affidavits are based on information and belief.

(2) That the particular affidavits under which said search-warrant was issued is based upon information received from another person, and was not based upon the personal knowledge of the affiant. [154]

(3) That both the affidavit and search-warrant failed to name a known defendant, and there is no averment in the affidavit setting forth that anyone was about to commit any crime against the laws of the United States, or was using the prop-

erty or about to use the property or premises for the commission of any felony.

(4) That said search-warrant does not show probable cause and is not supported by affidavit naming or describing any particular person or persons.

(5) That said search-warrant is in violation of the Fourth and Fifth Amendments to the Federal Constitution, and is also in violation of the provisions of the Volstead Act.

(6) That said property was seized and taken by the Prohibition Enforcement Supervisor and Prohibition Enforcement Agent, hereinbefore referred to, without any lawful warrant of any kind and without the consent of the defendants, or any of them, and it is the intention of the Government officials to introduce the same in evidence against the defendants.

(7) That said property was taken solely under the search-warrant heretofore referred to.

To which order the defendant Albert C. Morrison then and there duly excepted.

14. The Court erred in refusing to give the instruction requested by the defendant Albert C. Morrison in which the said defendant asked that the jury be directed to return a verdict of not guilty on the ground that the evidence was insufficient to warrant the submission of the case to the jury, for the reason that there was not sufficient evidence to warrant such submission, to which refusal by the Court to give said requested instruction said defendant then and there duly excepted in the

presence of the jury and before its retirement.
[155]

15. That the Court erred in making, giving and rendering judgment against the defendant Albert C. Morrison on the first count of the information herein for the reason that the first count of the information does not state a crime or any offense against the laws of the United States.

16. That the Court erred in rendering judgment against the defendant Albert C. Morrison for the reason that the first count of the information fails to state a crime or any offense against the law of the United States.

17. That the Court erred in sentencing the said defendant Albert C. Morrison to be imprisoned without his first being adjudged guilty of any crime.

18. That the Court erred in pronouncing sentence against said defendant.

19. That the Court erred in imposing a general sentence against all the defendants herein.

20. That the Court did not impose any specific sentence and judgment against the said defendant Albert C. Morrison based upon either the first or second count of the indictment of which he was found guilty, but imposed a general sentence against all of said defendants, as follows: That the defendants Albert C. Morrison and V. E. Lardi be imprisoned in the County Jail of San Francisco for the period of six months and that the defendants Richard Bucking and John Antonetti be imprisoned in said County Jail for the period of four months.

21. That the Court was without warrant of law to impose a general sentence.

22. That the judgment and sentence of the Court in sentencing the said defendant A. C. Morrison to six months imprisonment in the County Jail is excessive and beyond the jurisdiction [156] of the Court in this:

That a conviction for keeping liquor in violation of Title II of the Act of Congress of October 28th, 1919, to wit, the National Prohibition Act shall be subject to a fine for a offense of not more than Five Hundred Dollars (\$500).

That said defendant Morrison was not found guilty of selling intoxicating liquors but merely of keeping intoxicating liquors under the first and second counts of the information, and therefore could only have been punished by a fine not to exceed Five Hundred Dollars (\$500).

23. The judgment and sentence of the Court is void as being contrary to the provisions of the Act of Congress of October 28th, 1919, to wit, the National Prohibition Act, and is particularly in conflict with Section 29 of said Act.

24. The Court erred in imposing sentence on the first count of the information in that the count is fatally defective in that it fails to state that the liquor was kept for sale or other commercial purposes.

25. That the Court erred in imposing judgment and sentence on the second count of the information in that the second count of the information is

fatally defective in that it fails to state that the liquor was kept for sale or other commercial purposes.

26. That the Court erred in imposing any judgment and sentence against the defendant Albert C. Morrison upon the ground that the information is fatally defective in that it does not allege that any liquor was kept by the defendant Albert C. Morrison for the purpose of sale, or other commercial purposes.

27. That the judgment and sentence imposed by the Court upon the defendant Albert C. Morrison is repugnant to and in violation of Article VIII of the Amendments to the Constitution of [157] the United States.

28. That the Court erred in refusing the motion of the defendant Albert C. Morrison in arrest of judgment in the following particulars.

(1) That the first count of said information does not charge any offense against the laws of the United States, nor does it charge said defendant with the doing of anything the doing of which is forbidden by any of the laws of the United States.

(2) That the said first count of said information is fatally defective and void in that:

(a) It fails to set forth every element of the offense intended to be charged.

(b) It does not set forth the alleged offense in the language of the statute, or equivalent language.

(c) It does not set forth any facts sufficient in law to support a conviction.

(d) There is no fact or circumstance stated therein to advise the Court that an offense has been committed against the laws of the United States.

(3) That the said first count of said information is lacking in the essential elements to constitute the offense sought to be charged.

(4) That section 21 of Title II of the National Prohibition Act, this being the section under which the said first count of said information is based, (omitting the immaterial portions) is as follows:

“Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered *in violation of this title*, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon a conviction thereof shall be fined not more than \$1,000 or be imprisoned for not more than one year, or both. * * * ” [158]

The first count of said information, and the whole thereof, is as follows, to wit:

“That Albert C. Morrison, V. E. Lardi, Richard Bucking and John Antonetti, hereinafter called the defendants heretofore, to wit, on or about the 30th day of July, 1921, at and in ‘Techau Tavern,’ 247 Powell Street in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of

this court, then and there being, did then and there wilfully and unlawfully maintain a common nuisance in that the said defendant did then and there wilfully and unlawfully keep on the premises at and in 'Techau Tavern,' 247 Powell Street, City and County of San Francisco, aforesaid, certain intoxicating liquor, to wit: gin, whiskey, port wine and red wine, all of said intoxicating liquors, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the keeping of the said intoxicating liquor by the said defendant at the time and place aforesaid, was then and there prohibited, unlawful and in violation of section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided."

That the said first count of said information fails to charge that the liquor referred to therein was kept in violation of title II, or that it was kept for purposes of sale, or for other commercial purposes, or for any unlawful purpose.

(5) That it is not averred or claimed in the first count of said information that the liquor referred to therein was kept in violation of provisions of title II as section 21 requires.

(6) That section 21 referred to in the first

count of said information, only makes it an offense to keep intoxicating liquor in any house or building or place where it is so kept "in violation of" title II of the National Prohibition Act; that there is no averment of any kind or character in the first count of said information that the liquors referred to therein were kept in violation of title II, or for manufacture, sale, barter, transport, or export, or without a permit, or for any other unlawful purpose. [159]

(7) That the first count of said information fails to state facts sufficient to constitute the offense of willful or unlawful maintaining a common nuisance under the Act of Congress of October 28, 1919, namely, the National Prohibition Act.

(8) That this defendant has been convicted on the first count of said information without due process of law in violation of Article V and VI of the Constitution of the United States of America.

(9) That the second count of said information does not state facts sufficient to constitute an offense against the laws of the United States.

(10) That the second count of said information does not state facts sufficient to constitute an offense against the laws of the United States, in this:

(a) That there is no averment that the possessions of the intoxicating liquors referred to therein was for purpose of sale, or for any of the purposes referred to in section 3 of title II of the Act of Congress of October 28, 1919.

(b) That it fails to set forth every element of

the offense intended to be charged.

(c) That it does not set forth the alleged offense in the language of the statute, or equivalent language.

(d) That it does not set forth any facts sufficient in law to support a conviction.

(11) That this defendant has been convicted on the second count of said information herein without due process of law and in violation of Articles V and VI of the Constitution of the United States.

To which refusal by the Court to grant said motion in arrest of judgment the defendant Albert C. Morrison then and there [160] duly excepted.

29. That the Court erred in denying the motion of the defendant Albert C. Morrison for a new trial, to which refusal by the Court to grant a new trial the defendant Albert C. Morrison then and there duly excepted.

Dated: November 8, 1921.

BERT SCHLESINGER,
C. W. DURBROW,

Attorneys for Albert C. Morrison, One of the
Plaintiffs in Error.

Service of the within is hereby admitted this 8th day of November, 1921.

JOHN T. WILLIAMS,
United States Atty.

[Endorsed]: Filed Nov. 8, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [161]

In the Southern Division of the District Court of
the United States in and for the Northern Dis-
trict of California, First Division.

No. 9720.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERT C. MORRISON, V. E. LARDI, RICH-
ARD BUCKING and JOHN ANTONETTI,

Defendants.

**Assignment of Errors on Behalf of Defendant
V. E. Lardi.**

V. E. Lardi, a defendant in the above-entitled cause, and one of the plaintiffs in error herein, having petitioned for an order from said Court permitting him to procure a writ of error to this Court directed from the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence made and entered in said cause against said V. E. Lardi, one of the plaintiffs in error herein now makes and files with said petition the following assignment of errors herein upon which he will rely for a reversal of said judgment and sentence upon the said writ, and which errors and each and every of them are to the great detriment, injury and prejudice of the said V. E. Lardi, and in violation of the rights conferred upon him by law; and he says that in the record and proceedings in the above-entitled action, upon the hearing and determination thereof in the Southern Division

of the District Court of the United States for the Northern District of California, there is manifest error in this, to wit: [162]

1. That the evidence adduced on the trial of said cause failed to show that the said V. E. Lardi sold on the premises and in Techau Tavern, 247 Powell Street, San Francisco, any intoxicating liquor.

2. That the evidence showed that if any liquors were kept or sold on the premises in violation of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act, the keeping of said liquors or the sale of said liquors on said premises did not originate in the mind of the defendant V. E. Lardi, but in the minds of the officers of the Government.

3. That the evidence is insufficient to justify the conviction of the defendant in that the evidence shows that the defendant was not and never had been engaged in keeping or selling liquors in violation of the Act of Congress of October 28, 1919, to wit: the National Prohibition Act; that the conception of and the intention to do the acts which this defendant is claimed to have done did not originate in his mind or with him but were the products of the brains of the officers of the Government, which they instilled into the mind of the defendant, and by deceitful representation and importunities lured him to put into effect.

4. That the evidence is wholly insufficient to justify the judgment and sentence against the defendant V. E. Lardi in that there was not a scintilla

of evidence adduced, or which appears in the record, which shows, or tends to show, that the said V. E. Lardi, at any time in Techau Tavern, or elsewhere, kept, or possessed, or sold, or bartered, or gave away or otherwise disposed of intoxicating liquors, in violation of the Act of October 28, 1919, to wit, the National Prohibition Act, or had knowledge of the same. [163]

5. That the judgment and sentence as to this defendant is wholly unsustained by any evidence showing or tending to show that the defendant ever sold any intoxicating liquor on the premises Techau Tavern, or that he kept on said premises intoxicating liquor for the purpose of manufacture, sale, barter, transport, or export, or without a permit, or for any other unlawful purpose.

6. That said judgment and sentence as to the defendant V. E. Lardi is invalid and contrary to law for the reason that the evidence and record indisputably shows that the defendant V. E. Lardi did not, at any time or place or under any circumstances, keep on said premises, or possess, or sell, or manufacture, or barter, or transport, or export, or give away, or otherwise dispose of any intoxicating liquor in violation of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act, or in violation of any law of the United States.

7. That the judgment and sentence is against the law.

8. That the judgment and sentence is opposed to law in the particulars wherein we have showed the evidence to be insufficient to justify judgment and

sentence as to the defendant, V. E. Lardi.

9. The Court erred in overruling the objection to the introduction in evidence of that certain property and each and every article thereof described in a certain inventory attached to an alleged search-warrant issued on the 30th day of July, 1921, by Albert M. Hardie, United States Commissioner for the Northern District of California, and based on certain alleged affidavits of D. W. Rinckel and A. S. Rinckel, and which said search-warrant is addressed to the United States Prohibition Enforcement Supervisor, and to his deputies, or any or either of them, and which objections were made upon the grounds [164] that the search-warrant under which said property was taken was and is void in the following particulars:

(1) The supporting affidavits are based on information and belief.

(2) That the particular affidavit under which said search-warrant was issued is based upon information received from another person, and was not based upon the personal knowledge of the affiant.

(3) That both the affidavit and search-warrant failed to name a known defendant, and there is no averment in the affidavit setting forth that any one was about to commit any crime against the laws of the United States, or was using the property or about to use the property or premises for the commission of any felony.

(4) That said search-warrant does not show probable cause and is not supported by affidavit

naming or describing any particular person or persons.

(5) That said search-warrant is in violation of the Fourth and Fifth Amendments to the Federal Constitution, and is also in violation of the provisions of the Volstead Act.

(6) That said property was seized and taken by the Prohibition Enforcement Supervisor and Prohibition Enforcement Agent, hereinbefore referred to, without any lawful warrant of any kind and without the consent of the defendants, or any of them, and it is the intention of the Government officials to introduce the same in evidence against the defendants.

(7) That said property was taken solely under the search-warrant heretofore referred to.

To which order the defendant V. E. Lardi then and there duly excepted.

(10) The Court erred in refusing to give the instruction [165] requested by the defendant V. E. Lardi in which the said defendant asked that the jury be directed to return a verdict of not guilty on the ground that the evidence was insufficient to warrant the submission of the case to the jury, for the reason that there was not sufficient evidence to warrant such submission, to which refusal by the Court to give said requested instruction the said defendant then and there duly excepted in the presence of the jury and before its retirement.

11. That the Court erred in sentencing the said defendant V. E. Lardi to be imprisoned without

his first being adjudged guilty of any crime.

12. That the Court erred in pronouncing sentence against said defendant.

13. That the Court erred in imposing a general sentence against all the defendants herein.

14. That the Court did not impose any judgment and sentence against this defendant upon any specific count of the information, but imposed a general sentence against all the defendants, as follows: That the defendants Albert C. Morrison and V. E. Lardi be imprisoned in the County Jail of San Francisco for a period of six months and that the defendants Richard Bucking and John Antonetti be imprisoned in said County Jail for a period of four months.

15. That the Court was without warrant of law to impose a general sentence.

16. The judgment and sentence of the Court is void as being contrary to the provisions of the Act of Congress of October 28th, 1919, to wit, the National Prohibition Act, and is particularly in conflict with Section 29 of said Act. [166]

17. That the judgment and sentence imposed by the Court upon the defendant V. E. Lardi is repugnant to and in violation of Article VIII of the Amendments to the Constitution of the United States.

18. That the Court erred in refusing the motion of the defendant V. E. Lardi in arrest of judgment in the following particulars:

(1) That the said third and fourth counts of said information do not charge any offense against

the laws of the United States, nor do they charge said defendant with the doing of anything the doing of which is forbidden by any of the laws of the United States.

(2) That the said third and fourth counts of said information are fatally defective and void in that:

(a) They fail to set forth every element of the offense intended to be charged.

(b) They do not set forth any facts sufficient in law to support a conviction.

(c) There is no fact or circumstance stated therein to advise the Court that an offense has been committed against the laws of the United States.

(3) That this defendant has been convicted on the said third and fourth counts of said information without due process of law and in violation of Article V. and VI of the Constitution of the United States of America.

To which refusal by the Court to grant said motion in arrest of judgment the defendant V. E. Lardi then and there duly excepted.

19. That the Court erred in denying the motion of the defendant V. E. Lardi for a new trial, to which refusal by the [167] Court to grant a new trial the defendant V. E. Lardi then and there duly excepted.

Dated: November 8, 1921.

BERT SCHLESINGER,
C. W. DURBROW,

Attorneys for V. E. Lardi, One of the Plaintiffs
in Error.

Service of the within is hereby admitted this 8th day of November, 1921.

JOHN T. WILLIAMS,
U. S. Attorney.

[Endorsed]: Filed Nov. 8, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[168]

In the Southern Division of the District Court of the United States in and for the Northern District of California.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALBERT C. MORRISON, V. E. LARDI, RICHARD BUCKING and JOHN ANTONETTI,
Defendants.

Order Allowing Writ of Error and Supersedeas.

The writ of error and supersedeas therein prayed for by defendants Albert C. Morrison and V. E. Lardi pending the decision upon the writ of error are hereby allowed, and each of said defendants is admitted to bail upon the writ of error in the sum of Four Thousand Dollars (\$4,000). The bond for costs upon the writ of error is hereby fixed at the sum of Five Hundred Dollars (\$500.00).

Dated: November 8, 1921.

M. T. DOOLING,
District Judge of the United States for the Northern District of California.

Service of within hereby admitted this 8th day of November, 1921.

JOHN T. WILLIAMS,
U. S. Attorney.

[Endorsed]: Filed Nov. 8, 1921. W. B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.
[169]

In the Southern Division of the District Court of
the United States in and for the Northern Dis-
trict of California, First Division.

No. 9720.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALBERT C. MORRISON, V. E. LARDI, RICH-
ARD BUCKING and JOHN ANTONETTI,
Defendants.

Writ of Error (Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to
the Honorable, the Judges of the District Court
of the United States for the Northern District
of California, GREETING:

Because, in the record and proceedings, as also
in the rendition of the judgment of a plea which is
in the said District Court, before you, or some of
you, between Albert C. Morrison and V. E. Lardi,
plaintiffs in error, and the United States of Amer-

ica, defendant in error, a manifest error hath happened, to the great damage of the said Albert C. Morrison and V. E. Lardi, plaintiffs in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit [170] Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WM. HOWARD TAFT, Chief Justice of the United States, the 8th day of November, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

C. W. Calbreath,
Deputy Clerk.

Allowed by:

M. T. DOOLING,
Judge.

Dated: November 8th, 1921.

Service of within is hereby admitted this 8th day of November, 1921.

JOHN T. WILLIAMS,
U. S. Attorney.

[Endorsed]: Filed Nov. 8, 1921. W. B. Mal-
ling, Clerk. By C. W. Calbreath, Deputy Clerk.
[171]

In the Southern Division of the District Court of
the United States in and for the Northern Dis-
trict of California, First Division.

No. 9720.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

ALBERT C. MORRISON, V. E. LARDI, RICH-
ARD BUCKING and JOHN ANTONETTI,
Defendants.

Citation on Writ of Error (Copy).

United States of America,
Northern District of California,—ss.

To the United States of America, GREETING:

You are hereby cited and admonished to be and
appear at a United States Circuit Court of Appeals
for the Ninth Circuit, to be holden at the City of

San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's office at the United States District Court for the Northern District of California, wherein Albert C. Morrison and V. E. Lardi are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, Judge of the United States District Court, for the Northern District of [172] California, this 8th day of November, 1921.

M. T. DOOLING,
United States District Judge.

Service of the within is hereby admitted this 8th day of November, 1921.

JOHN T. WILLIAMS,
United States Attorney.

[Endorsed]: Filed Nov. 8, 1921. W. B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.
[173]

In the Southern Division of the District Court of
the United States in and for the Northern Dis-
trict of California.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERT C. MORRISON, V. E. LARDI, RICH-
ARD BUCKING and JOHN ANTONETTI,
Defendants.

Supersedeas Bond (Albert C. Morrison).

KNOW ALL MEN BY THESE PRESENTS,
that we, Albert C. Morrison of the City and County
of San Francisco, State of California, as principal,
and Carlton H. Wall and Alfred L. Meyerstein, both
of the City and County of San Francisco, State of
California, as sureties, are held and firmly bound
unto the United States of America in the full
sum of Four Thousand Dollars (\$4,000.00), lawful
money of the United States, and the further sum
of Five Hundred (\$500.00), lawful money of the
United States, to be paid to the United States of
America, to which payment, well and truly to be
made, we bind ourselves, our heirs, executors and
administrators, jointly and severally, by those pres-
ents.

Sealed with our seals and dated this 8th day of
November, 1921.

Whereas, lately at a term of the Southern Divi-
sion of the District Court of the United States,
for the Northern District of California, in a suit

pending in the said Court between the United States of America and Albert C. Morrison, V. E. Lardi, Richard Bucking and John Antonetti, defendants, a judgment and [174] sentence was made, given, rendered and entered against the said defendants, and the said Albert C. Morrison and V. E. Lardi having obtained a writ of error from the United States Circuit Court of Appeal for the Ninth Circuit to reverse said judgment and sentence, and a citation directed to the United States of America to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, pursuant to the terms and at the time fixed in said citation, which said citation has been duly served:

Now, the condition of the above obligation is such, that if the said Albert C. Morrison shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said court and prosecute his writ of error, and if the said Albert C. Morrison shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of said judgment and sentence as said Court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the District Court of the United States, for the Northern District of California, on such day or days as may be appointed for the retrial by said District Court, and abide by and obey

all orders made by said Court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void; otherwise to remain in full force.

ALBERT C. MORRISON. (Seal)

C. H. WALL. (Seal)

ALFRED L. MEYERSTEIN. (Seal)

[175]

Signed, sealed and acknowledged before me this 8th day of November, 1821.

[Seal of the Commissioner]

THOMAS E. HAYDEN,

U. S. Commissioner Northern District of California
at S. F.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

C. H. Wall and Alfred L. Meyerstein, being duly sworn, each for himself says: That he is a resident and householder in the Northern District of California, and is worth in property situated therein the sum of Four Thousand Five Hundred Dollars (\$4,500.00) over and above all his just debts and liabilities, exclusive of property exempt from execution.

C. H. WALL.

ALFRED L. MEYERSTEIN.

Subscribed and sworn to before me this 8th day of November, 1921.

[Seal of the Commissioner]

THOMAS E. HAYDEN,

U. S. Commissioner Northern District of California
at S. F.

[Endorsed]: Filed Nov. 8, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [176]

In the Southern Division of the District Court of
the United States in and for the Northern
District of California.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERT C. MORRISON, V. E. LARDI, RICH-
ARD BUCKING and JOHN ANTONETTI,
Defendants.

Supersedeas Bond (V. E. Lardi).

KNOW ALL MEN BY THESE PRESENTS,
that we, V. E. Lardi, of the City and County of San
Francisco, State of California, and Carlton H. Wall
and Alfred L. Meyerstein, both of the City and
County of San Francisco, State of California, as
sureties, are held and firmly bound unto the United
States of America in the full sum of Four Thousand
Dollars (\$4,000.00), lawful money of the United
States, and the further sum of Five Hundred Dol-
lars (\$500.00), lawful money of the United States,

to be paid to the United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by those presents.

Sealed with our seals and dated this 8th day of November, 1921.

Whereas, lately at a term of the Southern Division of the District Court of the United States, for the Northern District of California, in a suit pending in the said Court between the United States of America and Albert C. Morrison, V. E. Lardi, Richard Bucking and John Antonetti, defendants, a judgment and [177] sentence was made, given, rendered and entered against the said defendants, and the said Albert C. Morrison and V. E. Lardi having obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment and sentence, and a citation directed to the United States of America to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, pursuant to the terms and at the time fixed in said citation, which said citation has been duly served:

Now, the condition of the above obligation is such, that if the said V. E. Lardi shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said court and prosecute his writ of error, and if the said V. E. Lardi shall abide by and obey all orders made by the United

States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of said judgment and sentence as said Court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the District Court of the United States, for the Northern District of California, on such day or days as may be appointed for the retrial by said District Court, and abide by and obey all orders made by said Court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void; otherwise to remain in full force.

V. E. LARDI. (Seal)

C. H. WALL. (Seal)

ALFRED L. MEYERSTEIN. (Seal)

[178]

Signed, sealed and acknowledged before me this 8th day of November, 1921.

[Seal of the Commissioner]

THOMAS E. HAYDEN,

U. S. Commissioner Northern District of California
at S. F.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

C. H. Wall and Alfred L. Meyerstein, being duly sworn, each for himself says: That he is a resident and householder in the Northern District of California, and is worth in property situated therein the sum of Four Thousand Five Hundred Dollars

(\$4,500.00) over and above all his just debts and liabilities, exclusive of property exempt from execution.

C. H. WALL,

ALFRED L. MEYERSTEIN.

Subscribed and sworn to before me this 8th day of November, 1921.

[Seal of the Commissioner]

THOMAS E. HAYDEN,

U. S. Commissioner Northern District of California
at S. F.

[Endorsed]: Filed Nov. 8, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [179]

In the Southern Division of the District Court of
the United States in and for the Northern
District of California, First Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERT C. MORRISON, V. E. LARDI, RICH-
ARD BUCKING and JOHN ANTONETTI,
Defendants.

**Stipulation and Order Extending Time Thirty Days
to Prepare, Serve and File Bill of Exceptions.**

It is hereby stipulated and agreed that the defendants Albert C. Morrison and V. E. Lardi may have and they are hereby granted thirty (30) days from and after the date hereof within which to

prepare, serve and file bill of exceptions herein.

Dated: November 8, 1921.

ROBERT H. McCORMACK,
Special Asst. U. S. Attorney General.

So ordered:

M. T. DOOLING,
Judge.

Dated: November 8, 1921.

[Endorsed]: Filed Nov. 8, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [180]

In the Southern Division of the District Court of
the United States in and for the Northern
District of California, First Division.

No. 9720.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERT C. MORRISON, V. E. LARDI, RICH-
ARD BUCKING and JOHN ANTONETTI,
Defendants.

**Stipulation and Order Extending Time to and In-
cluding January 5, 1922, to Prepare and Serve
Bill of Exceptions.**

IT IS HEREBY STIPULATED AND AGREED
that the defendants Albert C. Morrison and V. E.
Lardi may have and they are hereby granted to
and including January 5, 1922, within which to
prepare and serve proposed bill of exceptions

herein on behalf of the defendants Albert C. Morrison and V. E. Lardi.

Dated: December 5, 1922.

ROBERT H. McCORMACK,
Special Asst. U. S. Attorney General.

BERT SCHLESINGER,

C. W. DURBROW,

Attorneys for Defendants Albert C. Morrison and
V. E. Lardi.

So ordered:

Dated: December 5th, 1921.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Dec. 5, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [181]

In the Southern Division of the District Court of
the United States in and for the Northern
District of California, First Division.

No. 9720.

UNITED STATES OF AMERICA,

Plaintiff and Defendant in Error,

vs.

ALBERT C. MORRISON and V. E. LARDI,

Defendants and Plaintiffs in Error.

Stipulation and Order Extending Time to and Including February 1, 1922, for Settlement of Bill of Exceptions.

IT IS HEREBY STIPULATED AND AGREED that the time to present for settlement and have settled the bill of exceptions of the defendants and plaintiffs in error, Albert C. Morrison and V. E. Lardi, in the above-entitled action, and any amendments that are made thereto by the plaintiff and defendant in error herein, is extended to and including February 1, 1922.

Dated: January 7, 1922.

R. H. McCORMACK,
Sp. Asst. Atty. Gen.

JOHN T. WILLIAMS,
U. S. Dist. Atty.

T. J. SHERIDAN,
Asst. U. S. Atty.

C. W. DURBROW,
BERT SCHLESINGER,

Attorneys for Defendants and Plaintiffs in Error
Albert C. Morrison and V. E. Lardi.

It is so ordered:

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jan. 7, 1922. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [182]

In the Southern Division of the District Court of
the United States in and for the Northern
District of California, First Division.

No. 9720.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.

ALBERT C. MORRISON and V. E. LARDI,
Defendants and Plaintiffs in Error.

**Stipulation and Order Extending Time to and In-
cluding February 10, 1922, for Settlement of
Bill of Exceptions.**

IT IS HEREBY STIPULATED that the above-
named court may settle and file the Bill of Excep-
tions heretofore prepared and signed by the re-
spective attorneys for plaintiffs and defendants on
or before February 10, 1922.

Dated: February 30th, 1922.

ROBT. H. McCORMACK,
JOHN T. WILLIAMS,
T. J. SHERIDAN,

Attorneys for Plaintiff and Defendant in Error.

C. W. DURBROW,
BERT SCHLESINGER,

Attorneys for Defendants and Plaintiffs in Error.

It is so ordered:

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jan. 30, 1922. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [183]

In the Southern Division of the District Court of
the United States in and for the Northern
District of California, First Division.

No. 9720.

UNITED STATES OF AMERICA,

Plaintiff and Defendant in Error,

vs.

ALBERT C. MORRISON and V. E. LARDI,

Defendants and Plaintiffs in Error.

**Stipulation and Order Extending Time to and In-
cluding February 20, 1922, for Settlement of
Bill of Exceptions.**

IT IS HEREBY STIPULATED that the above-
named court may settle and file the bill of excep-
tions heretofore prepared and signed by the re-
spective attorneys for plaintiff and defendants on
or before February 20, 1922.

Dated: February 10, 1922.

R. H. McCORMACK,
Sp. Asst. U. S. Atty. Gen.,

JOHN T. WILLIAMS,
United States Attorney.

T. J. SHERIDAN,
Asst. U. S. Atty.,

Attorneys for Plaintiff and Defendant in Error.

C. W. DURBROW,

BERT SCHLESINGER,

Attorneys for Defendants and Plaintiffs in Error.

It is so ordered:

M. T. DOOLING,
Judge.

[Endorsed]: Filed Feb. 10, 1922. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [184]

In the Southern Division of the District Court of
the United States in and for the Northern
District of California, First Division.

No. 9720.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.

ALBERT C. MORRISON and V. E. LARDI,
Defendants and Plaintiffs in Error.

**Stipulation and Order Extending Time to and In-
cluding February 25, 1922, for Settlement of
Bill of Exceptions.**

IT IS HEREBY STIPULATED that the above-
named court may settle and file the bill of ex-
ceptions heretofore prepared and signed by the re-
spective attorneys for plaintiffs and defendants on
or before February 25th, 1922.

Dated, February 18th, 1922.

ROBT. H. McCORMACK,
JOHN T. WILLIAMS,
BEN F. GEIS,

Attorneys for Plaintiff and Defendant in Error.

BERT SCHLESINGER,
C. W. DURBROW,

Attorneys for Defendants and Plaintiffs in Error.

It is so ordered:

M. T. DOOLING,
Judge.

[Endorsed]: Filed Feb. 18, 1922. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [185]

In the Southern Division of the District Court of
the United States in and for the Northern
District of California, First Division.

No. 9720.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERT C. MORRISON, V. E. LARDI, RICH-
ARD BUCKING and JOHN ANTONETTI,
Defendants.

**Stipulation and Order (Transmitting Original Ex-
hibits).**

It is hereby stipulated that the exhibits num-
bered 6 and 7 of the United States of America, the
plaintiff above named, which were admitted in evi-

dence on the trial of the above-entitled action, need not be printed in the bill of exceptions, nor in the transcript on appeal herein, but that the Clerk of the above-named court shall transmit said exhibits to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and said exhibits shall be deemed a part of the bill of exceptions herein notwithstanding they are not printed therein, and may be referred to and used by any of the parties hereto without objection on the hearing on appeal with the same force and effect as though the same and each thereof had been printed in said bill of exceptions and in the transcript on appeal.

Dated: February 24th, 1922.

ROBT. H. McCORMACK,
Special Asst. U. S. Atty. General,
JOHN T. WILLIAMS,
U. S. Atty., [186]
T. J. SHERIDAN,
Asst. U. S. Atty.,
BEN F. GEIS,
Asst. U. S. Atty.,
Attorneys for Plaintiff.
BERT SCHLESINGER,
C. W. DURBROW,
Attorneys for Defendants.

It is so ordered:

M. T. DOOLING,
Judge.

[Endorsed]: Filed Feb. 24, 1922. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [187]

Certificate of Clerk U. S. District Court to Transcript of Record on Writ of Error.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 187 pages, numbered from 1 to 187, inclusive, contain a full, true, and correct transcript of certain records and proceedings, in the case of United States of America, vs. Albert C. Morrison et al., No. 9720, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on writ of error (copy of which is embodied herein), and the instructions of the attorney for defendants and plaintiffs in error herein.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of Seventy-nine Dollars and Thirty-five Cents (\$79.35), and that the same has been paid to me by the attorney for the plaintiffs in error herein.

Annexed hereto are the original writ of error (page 189), return to writ of error (page 192), and original citation on writ of error (page 193).

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, this 29th day of March, A. D. 1922.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,

Deputy Clerk. [188]

In the Southern Division of the District Court of
the United States in and for the Northern
District of California, First Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

ALBERT C. MORRISON, V. E. LARDI, RICH-
ARD BUCKING and JOHN ANTONETTI,
Defendants.

Writ of Error (Original).

United States of America,—ss.

The President of the United States of America,
to the Honorable, the Judges of the District
Court of the United States for the Northern
District of California, GREETING:

Because, in the record and proceedings, as also
in the rendition of the judgment of a plea which
is in the said District Court, before you, or some of
you, between Albert C. Morrison and V. E. Lardi,
plaintiffs in error, and the United States of Amer-
ica, defendant in error, a manifest error hath
happened, to the great damage of the said Albert
C. Morrison and V. E. Lardi, plaintiffs in error,
as by his complaint appears:

We, being willing that error, if any hath been,
should be duly corrected, and full and speedy
justice be done to the parties aforesaid in this be-
half, do command you, if judgment be therein
given, that then, under your seal, distinctly and
openly you send the record and proceedings afore-

said, with all things concerning the same, to the United States Circuit Court of Appeals for the [189] Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WM. HOWARD TAFT, Chief Justice of the United States, the 8th day of November, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

C. W. Calbreath,
Deputy Clerk.

Allowed by:

M. T. DOOLING,
Judge.

Dated: November 8th, 1921. [190]

[Endorsed]: No. 9720. Southern Division of the District Court of the United States, Northern District of California. United States of America, Plaintiff, vs. Albert C. Morrison, V. E. Lardi, et al., Defendants. Writ of Error. Filed Nov. 8, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Service of within hereby admitted this 8th day of November 1921.

JOHN T. WILLIAMS,
U. S. Attorney. [191]

Return to Writ of Error.

The answer of the Judges of the District Court of the United States, for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within obtained.

We further certify that a copy of this writ was on the 8th day of November, A. D. 1921, duly lodged in the case in this Court for the within named defendant in error.

By the Court:

[Seal] WALTER B. MALING,
Clerk U. S. District Court, Northern District of
California.

By C. M. Taylor,
Deputy Clerk. [192]

In the Southern Division of the District Court of
the United States in and for the Northern
District of California, First Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERT C. MORRISON, V. E. LARDI, RICH-
ARD BUCKING and JOHN ANTONETTI,
Defendants.

Citation on Writ of Error (Original).

United States of America,
Northern District of California,—ss.

To the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's office at the United States District Court for the Northern District of California, wherein Albert C. Morrison and V. E. Lardi are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, Judge of the United States District Court,

for the Northern District of [193] California,
this 8th day of November, 1921.

M. T. DOOLING,
United States District Judge. [194]

Service of the within is hereby admitted this 8th
day of November, 1921.

JOHN T. WILLIAMS,
U. S. Attorney. [195]

[Endorsed]: No. 9720. Southern Division of
the District Court of the United States, Northern
District of California. United States of America,
Plaintiff, vs. Albert C. Morrison, V. E. Lardi, Rich-
ard Bucking and Antonetti, Defendants. Citation
on Writ of Error. Filed Nov. 8, 1921. W. B.
Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[Endorsed]: No. 3858. United States Circuit
Court of Appeals for the Ninth Circuit. Albert C.
Morrison and V. E. Lardi, Plaintiffs in Error, vs.
The United States of America, Defendant in Error.
Transcript of Record. Upon Writ of Error to the
Southern Division of the United States District
Court of the Northern District of California, First
Division.

Filed April 5, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

ALBERT C. MORRISON and V. E. LARDI,
Plaintiffs in Error,
vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**Order Enlarging Time to and Including January 5,
1922, to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR, IT
IS HEREBY ORDERED that the plaintiffs in
error may have and they are hereby granted to and
including January 5, 1922, within which to file the
transcript on appeal and docket the cause in this
case on writ of error to the Southern Division of
the District Court of the United States in and for
the Northern District of California, First Division,
and the return day of the citation heretofore issued
in the above-entitled action is enlarged to January
5, 1922.

Dated: December 5, 1921.

WM. H. HUNT,
Judge.

[Endorsed]: No. 3858. United States Circuit
Court of Appeals Ninth Circuit. Albert C. Mor-
rison and V. E. Lardi, Plaintiffs in Error, vs.
United States of America, Defendant in Error.
Order Enlarging Return Day of Citation. Filed
Dec. 5, 1921. F. D. Monckton, Clerk. Refiled
Apr. 5, 1922. F. D. Monckton, Clerk.

In the Southern Division of the District Court of
the United States in and for the Northern
District of California, First Division.

No. 9720.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error.
vs.

ALBERT C. MORRISON, V. E. LARDI, RICH-
ARD BUCKING and JOHN ANTONETTI,
Defendants and Plaintiffs in Error.

**Stipulation and Order Enlarging Return Day on
Writ of Error and Citation on Writ of Error
Thirty Days.**

It is hereby stipulated that the return day on
the writ of error and on the citation on the writ of
error may be, and the same is, hereby extended
thirty (30) days from January 5, 1922.

Dated: January 5, 1922.

R. H. McCORMACK,
Special Atty. Gen.,
JOHN T. WILLIAMS,
U. S. Atty.,
T. J. SHERIDAN,
Asst. U. S. Atty.,

Attorneys for Plaintiff and Defendant in Error.

C. W. DURBROW,
BERT SCHLESINGER,

Attorneys for Defendants Albert C. Morrison and
V. E. Lardi, and Plaintiffs in Error.

So ordered:

M. T. DOOLING,
Judge.

[Endorsed]: No. 9720. Southern Division of the District Court of the United States, Northern District of California, First Division. United States of America, Plaintiff, and Defendant in Error, vs. Albert C. Morrison, V. E. Lardi, Richard Bucking and John Antonetti, Defendants, and Plaintiffs in Error. Stipulation and Order Enlarging Return Day on Writ of Error and Citation on Writ of Error.

No. 3858. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including Feb. 4, 1922, to File Record and Docket Cause. Filed Jan. 5, 1922. F. D. Monckton, Clerk. Refiled Apr. 5, 1922. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.

ALBERT C. MORRISON, V. E. LARDI,
Defendants and Plaintiffs in Error.

**Stipulation and Order Enlarging Return Day on
Writ of Error and Citation on Writ of Error
Thirty Days.**

It is hereby stipulated that the return day on the writ of error and on the citation on the writ of error may be, and the same is, extended thirty (30) days from February 4, 1922.

Dated: February 3, 1922.

R. H. McCORMACK,
Sp. Atty. Gen.,
JOHN T. WILLIAMS,
U. S. Atty.,
T. J. SHERIDAN,
Asst. U. S. Atty.

Attorneys for Plaintiff and Defendant in Error.

C. W. DURBROW,
BERT SCHLESINGER,
Attorneys for Defendants and Plaintiffs in Error.

So ordered:

W. H. HUNT,
Judge.

[Endorsed]: No. 3858. U. S. Circuit Court of Appeals, for the Ninth Circuit. United States of America, Plaintiff and Defendant in Error, vs. Alfred C. Morrison and V. E. Lardi, Defendants and Plaintiffs in Error. Stipulation and Order Enlarging Return Day on Writ of Error and Citation on Writ of Error. Filed Feb. 3, 1922. F. D. Monckton, Clerk. Refiled Apr. 5, 1922. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

ALBERT C. MORRISON and V. E. LARDI,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**Stipulation and Order Enlarging Return Day on
Writ of Error and Citation on Writ of Error
Thirty Days.**

It is hereby stipulated that the return day on the writ of error and on the citation on the writ of error may be, and the same is, hereby extended thirty (30) days from March 6th, 1922.

Dated: March 4th, 1922.

C. W. DURBROW,
BERT SCHLESINGER,
Attorneys for Plaintiffs in Error.

JOHN T. WILLIAMS,
Attorney for Defendant in Error.

It is so ordered by the Court.

W. H. HUNT,
Judge.

[Endorsed]: No. 3858. In the United States Circuit Court of Appeals for the Ninth Circuit. Albert C. Morrison and V. E. Lardi, Plaintiffs in Error, vs. United States of America, Defendant in Error. Stipulation and Order Enlarging Return Day on Writ of Error and Citation on Writ of Error. Filed Mar. 4, 1922. F. D. Monekton, Clerk. Refiled Apr. 5, 1922. F. D. Monekton, Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GENERAL CIGAR COMPANY, INC., a
corporation,

Plaintiff in Error,

vs.

FIRST NATIONAL BANK OF PORT-
LAND, Oregon, a National Banking cor-
poration,

Defendant in Error.

TRANSCRIPT OF RECORD

On Writ of Error to the District Court of the United
States, for the District of Oregon, Honorable
Charles E. Wolverton, District Judge.

FILED
DEC 26 1922
F. D. MONOKTON,
CLERK

Names and Addresses of Counsel

DOLPH, MALLORY, SIMON & GEARIN,
Mohawk Building, Portland, Ore.

JOHN M. GEARIN,
Mohawk Building, Portland, Ore.

EDGAR FREED,
Mohawk Building, Portland, Ore.
Attorneys for Defendant in Error.

DEY, HAMPSON & NELSON,
Yeon Building, Portland, Ore.

ROSCOE C. NELSON,
Yeon Building, Portland, Ore.

GEO. L. BULAND,
Yeon Building, Portland, Ore.
Attorneys for Plaintiff in Error.

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(In conformity with stipulation of counsel printed at page 159 of this Transcript, the caption, titles, clerk's endorsements, and other formal matters appearing in the original papers, not material to this hearing, are omitted therefrom.)

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GENERAL CIGAR COMPANY, INC., a
corporation,

Plaintiff in Error,

vs.

FIRST NATIONAL BANK OF PORT-
LAND, Oregon, a National Banking cor-
poration,

Defendant in Error.

TRANSCRIPT OF RECORD

On Writ of Error to the District Court of the United
States, for the District of Oregon, Honorable
Charles E. Wolverton, District Judge.

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(In conformity with stipulation of counsel printed at page 159 of this Transcript, the caption, titles, clerk's endorsements, and other formal matters appearing in the original papers, not material to this hearing, are omitted therefrom.)

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No.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL CIGAR COMPANY, INC., a
corporation,

Plaintiff in Error,

vs.

FIRST NATIONAL BANK OF PORT-
LAND, Oregon, a National Banking cor-
poration,

Defendant in Error.

TRANSCRIPT OF RECORD

On Writ of Error to the District Court of the United
States, for the District of Oregon, Honorable
Charles E. Wolverton, District Judge.

IN THE DISTRICT COURT OF THE UNITED
STATES, FOR THE DISTRICT
OF OREGON

GENERAL CIGAR COMPANY, INC., a corporation,	} Plaintiff in Error, vs. } Defendant in Error.
FIRST NATIONAL BANK OF PORT- LAND, Oregon, a National Banking cor- poration,	

BE IT REMEMBERED, that on the 7th day of
November, 1921, there was filed in the above entitled
court and cause the following

COMPLAINT.

Comes now the plaintiff in the above entitled court
and cause, and for its first cause of action against the
above named defendant complains and alleges:

I.

That plaintiff now is, and at all times herein men-
tioned was, a corporation duly organized, incorporated
and existing under and by virtue of the laws of the
State of New York, with its principal office in said state,
and it now is, and at said times was, a citizen of said
state; that it now is, and at all times herein mentioned
has been, duly licensed, authorized and empowered to
transact business as a foreign corporation in the State

of Oregon, having complied with the requirements of said state with reference to foreign corporations, filed its Articles of Incorporation therein, designated a Statutory Agent for the service of process, and paid its license fees.

II.

That defendant now is, and at all times herein mentioned was, a national banking corporation organized under the laws of the United States with its principal place of business in the City of Portland, Oregon, and is a citizen of, and resides in, said State.

III.

That the matter involved in this action exceeds in amount, exclusive of interest and costs, \$3000.00.

IV.

That on or about December 13, 1919, plaintiff at Spokane, Washington, through its agents engaged in conducting plaintiff's business branch in said city and state, drew its check, being No. 397, on the Spokane & Eastern Trust Company, a banking corporation of Spokane, Washington, payable to itself in the amount of \$1,293.58; that said check was transmitted in the usual course of business by plaintiff's said Spokane branch to plaintiff's Portland branch; that said check was received by plaintiff's agents conducting plaintiff's business at Portland, Oregon, and the same was endorsed

for the purpose of deposit by rubber stamp endorsement on the back thereof as follows:

Pay to the Order of
First National Bank
335 Portland, Ore. 335
General Cigar Co., Inc.
M. A. Gunst Branch
M. A. Gunst & Co.

that said special endorsement above set forth was one uniformly and continuously theretofore used by the plaintiff for purposes of deposit in the defendant Bank, and was in the form prescribed and recommended by said defendant Bank, and by the Portland Clearing House Association, of which said defendant Bank was at all times herein mentioned a member, as the form to be used for purposes of deposit.

V.

That thereafter one N. W. Turrell, wrongfully and without authority from plaintiff, took and converted to his own use said check endorsed as above stated, and on or about December 15, 1919, wrongfully and without authority from plaintiff, transferred said check to the defendant; that thereafter on or about December 18, 1919, defendant presented said check to the bank on which the same was drawn, and said drawee bank paid said defendant the face amount of said check, to-wit: the sum of \$1,293.58, and on the date of said payment charged said sum to plaintiff's account at said drawee

bank, and said sum has ever since remained charged to plaintiff's said account; that defendant has at no time paid plaintiff, or credited plaintiff's account with, any sums whatever on account of said check or the proceeds thereof.

VI.

That by reason of the matters and things aforesaid defendant did on or about said December 18, 1919, receive said sum of \$1,293.58 for plaintiff's use and to which plaintiff was, and is, entitled in right and justice, and defendant did on said date become justly indebted to plaintiff in said sum of \$1,293.58, which sum and no part thereof has been paid plaintiff by defendant although the same has been often demanded, and defendant has, by its letter of August 20, 1921, refused to pay said sum or any part thereof.

Plaintiff for its second cause of action against said defendant alleges:

I.

Realleges the matter contained in Paragraph I of plaintiff's first cause of action herein.

II.

Realleges the matter contained in Paragraph II of plaintiff's first cause of action herein.

III.

Realleges the matter contained in Paragraph III of

plaintiff's first cause of action herein.

IV.

That on or about January 17, 1920, plaintiff at Seattle, Washington, through its agents engaged in conducting plaintiff's business branch in said city and state drew its check, being No. G.25, on the Union National Bank, a banking corporation of Seattle, Washington, payable to itself in the amount of \$467.13; that said check was transmitted in the usual course of business by plaintiff's said Seattle branch to plaintiff's Portland branch; that said check was received by plaintiff's agents conducting plaintiff's business at Portland, Oregon, and the same was endorsed for the purpose of deposit by rubber stamp endorsement on the back thereof as follows:

Pay to the Order of
First National Bank
335 Portland, Ore. 335
General Cigar Co., Inc.
M. A. Gunst Branch
M. A. Gunst & Co.

that said special endorsement above set forth was one uniformly and continuously theretofore used by the plaintiff for purposes of deposit in the defendant Bank, and was in the form prescribed and recommended by said defendant Bank, and by the Portland Clearing House Association, of which said defendant Bank was

at all times herein mentioned a member, as the form to be used for purposes of deposit.

V.

That thereafter one N. W. Turrell wrongfully and without authority from plaintiff, took and converted to his own use said check endorsed as above stated, and on or about January 20, 1920, wrongfully and without authority from plaintiff, transferred said check to the defendant; that thereafter on or about January 22, 1920, defendant presented said check to the bank on which the same was drawn, and said drawee bank paid said defendant the face amount of said check, to-wit: the sum of \$467.13, and on the date of said payment charged said sum to plaintiff's account at said drawee bank, and said sum has ever since remained charged to plaintiff's said account; that defendant has at no time paid plaintiff, or credited plaintiff's account with, any sums whatever on account of said check or the proceeds thereof.

VI.

That by reason of the matters and things aforesaid defendant did on or about said January 22, 1920, receive said sum of \$467.13 for plaintiff's use and to which plaintiff was, and is, entitled in right and justice, and defendant did on said date become justly indebted to plaintiff in said sum of \$467.13, which sum and no part thereof has been paid plaintiff by defendant although the same has been often demanded, and defendant has,

by its letter of August 20, 1921, refused to pay said sum or any part thereof.

Plaintiff for its third cause of action against said defendant alleges:

I.

Realleges the matter contained in Paragraph I of plaintiff's first cause of action herein.

II.

Realleges the matter contained in Paragraph II of plaintiff's first cause of action herein.

III.

Realleges the matter contained in Paragraph III of plaintiff's first cause of action herein.

IV.

That on or about January 28, 1920, plaintiff at Seattle, Washington, through its agents engaged in conducting plaintiff's business branch in said city and state, drew its check, being No. G.46, on the Union National Bank, a banking corporation of Seattle, Washington, payable to itself in the amount of \$2,334.01; that said check was transmitted in the usual course of business by plaintiff's said Seattle branch to plaintiff's Portland branch; that said check was received by plaintiff's agents conducting plaintiff's business at Portland, Oregon, and the same was endorsed for the purpose of deposit by rubber stamp endorsement on the back thereof as follows:

Pay to the Order of
First National Bank
335 Portland, Ore. 335
General Cigar Co., Inc.
M. A. Gunst Branch
M. A. Gunst & Co.

that said special endorsement above set forth was one uniformly and continuously theretofore used by the plaintiff for purposes of deposit in the defendant Bank, and was in the form prescribed and recommended by said defendant Bank, and by the Portland Clearing House Association, of which said defendant Bank was at all times herein mentioned a member, as to the form to be used for purposes of deposit.

V.

That thereafter one N. W. Turrell wrongfully and without authority from plaintiff, took and converted to his own use said check endorsed as above stated, and on or about January 31, 1920, wrongfully and without authority from plaintiff, transferred said check to the defendant; that thereafter on or about February 2, 1920, defendant presented said check to the bank on which the same was drawn, and said drawee bank paid said defendant the face amount of said check, to-wit: the sum of \$2,334.01, and on the date of said payment charged said sum to plaintiff's account at said drawee bank, and said sum has ever since remained charged to plaintiff's said account; that defendant has at no time

paid plaintiff, or credited plaintiff's account with, any sums whatever on account of said check or the proceeds thereof.

VI.

That by reason of the matters and things aforesaid defendant did on or about said February 2, 1920, receive said sum of \$2,334.01 for plaintiff's use and to which plaintiff was, and is, entitled in right and justice, and defendant did on said date become justly indebted to plaintiff in said sum of \$2,334.01, which sum and no part thereof has been paid plaintiff by defendant although the same has been often demanded, and defendant has, by its letter of August 20, 1921, refused to pay said sum or any part thereof.

Plaintiff for its fourth cause of action against said defendant alleges:

I.

Realleges the matter contained in Paragraph I of plaintiff's first cause of action herein.

II.

Realleges the matter contained in Paragraph II of plaintiff's first cause of action herein.

III.

Realleges the matter contained in Paragraph III of plaintiff's first cause of action herein.

IV.

That on or about March 10, 1920, plaintiff at Spokane, Washington, through its agents engaged in conducting plaintiff's business branch in said city and state, drew its check, being No. G.120, on the Spokane & Eastern Trust Company, a banking corporation of Spokane, Washington, payable to itself in the amount of \$160.94; that said check was transmitted in the usual course of business by plaintiff's said Spokane branch to plaintiff's Portland branch; that said check was received by plaintiff's agents conducting plaintiff's business at Portland, Oregon, and the same was endorsed for the purpose of deposit by rubber stamp endorsement on the back thereof as follows:

Pay to the Order of
First National Bank
335 Portland, Ore. 355
General Cigar Co., Inc.
M. A. Gunst Branch
M. A. Gunst & Co.

that said special endorsement above set forth was one uniformly and continuously theretofore used by the plaintiff for purposes of deposit in the defendant Bank, and was in the form prescribed and recommended by said defendant Bank, and by the Portland Clearing House Association, of which said defendant Bank was at all times herein mentioned a member, as the form to be used for purposes of deposit.

IV.

That thereafter one N. W. Turrell wrongfully and without authority from plaintiff, took and converted to his own free use said check endorsed as above stated, and on or about March 16, 1920, wrongfully and without authority from plaintiff, transferred said check to the defendant; that thereafter on or about March 18, 1920 defendant presented said check to the bank on which the same was drawn, and said drawee bank paid said defendant the face amount of said check, to-wit: the sum of \$160.94, and on the date of said payment charged said sum to plaintiff's account at said drawee bank, and said sum has ever since remained charged to plaintiff's said account; that defendant has at no time paid plaintiff, or credited plaintiff's account with, any sums whatever on account of said check or the proceeds thereof.

VI.

That by reason of the matters and things aforesaid defendant did on or about March 18, 1920, receive said sum of \$160.94 for plaintiff's use and to which plaintiff was, and is entitled in right and justice, and defendant did on said date become justly indebted to plaintiff in said sum of \$160.94, which sum and no part thereof has been paid plaintiff by defendant although the same has been often demanded, and defendant has, by its letter of August 20, 1921, refused to pay said sum or any part thereof.

Plaintiff for its fifth cause of action against said defendant alleges:

I.

Realleges the matter contained in Paragraph I of Plaintiff's first cause of action herein.

II.

Realleges the matter contained in Paragraph II of plaintiff's first cause of action herein.

IV.

That on or about March 29, 1920, plaintiff at Spokane, Washington, through its agents engaged in conducting plaintiff's business branch in said city and state, drew its check, being No. G.170, on the Spokane & Eastern Trust Company, a banking corporation of Spokane, Washington, payable to itself in the amount of \$998.53; that said check was transmitted in the usual course of business by plaintiff's said Spokane branch to plaintiff's agents conducting plaintiff's business at Portland, Oregon, and the same was endorsed for the purpose of deposit by rubber stamp endorsement on the back thereof as follows:

Pay to the Order of
First National Bank
335 Portland, Ore. 355
General Cigar Co., Inc.
M. A. Gunst Branch
M. A. Gunst & Co.

that said special endorsement above set forth was one uniformly and continuously theretofore used by the

plaintiff for purposes of deposit in the defendant Bank, and was in the form prescribed and recommended by said defendant Bank, and by the Portland Clearing House Association, of which said defendant Bank was at all times herein mentioned a member, as the form to be used for purposes of deposit.

V.

That thereafter one N. W. Turrell wrongfully and without authority from plaintiff, took and converted to his own use said check endorsed as above stated, and on or about April 2, 1920, wrongfully and without authority from plaintiff, transferred said check to the defendant; that thereafter on or about April 5, 1920, defendant presented said check to the bank on which the same was drawn, and said drawee bank paid said defendant the face amount of said check, to-wit: the sum of \$998.53, and on the date of said payment charged said sum to plaintiff's account at said drawee bank, and said sum has ever since remained charged to plaintiff's said account; that defendant has at no time paid plaintiff, or credited plaintiff's account with, any sums whatever on account of said check or the proceeds thereof.

VI.

That by reason of the matters and things aforesaid defendant did on or about said April 5, 1920, receive said sum of \$998.53 for plaintiff's use and to which plaintiff was, and is, entitled in right and justice, and

defendant did on said date become justly indebted to plaintiff in said sum of \$998.53, which sum and no part thereof has been paid plaintiff by defendant although the same has been often demanded, and defendant has, by its letter of August 20, 1921, refused to pay said sum or any part thereof.

Plaintiff for its sixth cause of action against said defendant alleges:

I.

Realleges the matter contained in Paragraph I of plaintiff's first cause of action herein.

II.

Realleges the matter contained in Paragraph II of plaintiff's first cause of action herein.

III.

Realleges the matter contained in Paragraph III of plaintiff's first cause of action herein.

IV.

That on or about April 26, 1920, plaintiff at Seattle, Washington, through its agents engaged in conducting plaintiff's business branch in said city and state, drew its check, being No. G.286, on the Union National Bank, a banking corporation of Seattle, Washington, payable to itself in the amount of \$713.49; that said check was transmitted in the usual course of business

by plaintiff's said Seattle branch to plaintiff's Portland branch; that said check was received by plaintiff's agents conducting plaintiff's business at Portland, Oregon, and the same was endorsed for the purpose of deposit by rubber stamp endorsement on the back thereof as follows:

Pay to the Order of
First National Bank
355 Portland, Ore. 355
General Cigar Co., Inc.
M. A. Gunst Branch
M. A. Gunst & Co.

that said special endorsement above set forth was one uniformly and continuously theretofore used by the plaintiff for purposes of deposit in the defendant Bank, and was in the form prescribed and recommended by said defendant Bank, and by the Portland Clearing House Association, of which said defendant Bank was at all times herein mentioned a member, as the form to be used for purposes of deposit.

V.

That thereafter one N. W. Turrell wrongfully and without authority from plaintiff, took and converted to his own use said check endorsed as above stated, and on or about April 27, 1920, wrongfully and without authority from plaintiff, transferred said check to the defendant; that thereafter on or about April 28, 1920, defendant presented said check to the bank on which

the same was drawn, and said drawee bank paid said defendant the face amount of said check, to-wit: the sum of \$713.49, and on the date of said payment charged said sum to plaintiff's account at said drawee bank, and said sum has ever since remained charged to plaintiff's said account; that defendant has at no time paid plaintiff, or credited plaintiff's account with, any sums whatever on account of said check or the proceeds thereof.

VI.

That by reason of the matters and things aforesaid defendant did on or about said April 28, 1920, receive said sum of \$713.49 for plaintiff's use and to which plaintiff was, and is, entitled in right and justice, and defendant did on said date become justly indebted to plaintiff in said sum of \$713.49, which sum and no part thereof has been paid plaintiff by defendant although the same has been often demanded, and defendant has, by its letter of August 20, 1921, refused to pay said sum or any part thereof.

* * * *

Plaintiff for its ninth cause of action against said defendant alleges:

I.

Realleges the matter contained in Paragraph I of plaintiff's first cause of action herein.

II.

Realleges the matter contained in Paragraph II of plaintiff's first cause of action herein.

III.

Realleges the matter contained in Paragraph III of plaintiff's first cause of action herein.

IV.

That on or about November 10, 1920, plaintiff at Spokane, Washington, through its agents engaged in conducting plaintiff's business branch in said city and state, drew its check, being No. G.799, on the Spokane & Eastern Trust Company, a banking corporation of Spokane, Washington, payable to itself in the amount of \$1,005.96; that said check was transmitted in the usual course of business by plaintiff's said Spokane branch to plaintiff's Portland branch; that said check was received by plaintiff's agents conducting plaintiff's business at Portland, Oregon, and the same was endorsed for the purpose of deposit by rubber stamp endorsement on the back thereof as follows:

Pay to the Order of
First National Bank
355 Portland, Ore. 355
General Cigar Co., Inc.
M. A. Gunst Branch
M. A. Gunst & Co.

that said special endorsement above set forth was one

uniformly and continuously theretofore used by the plaintiff for purposes of deposit in the defendant Bank, and was in the form prescribed and recommended by said defendant Bank, and by the Portland Clearing House Association, of which said defendant Bank was at all times herein mentioned a member, as the form to be used for purposes of deposit.

V.

That thereafter one N. W. Turrell wrongfully and without authority from plaintiff, took and converted to his own use said check endorsed as above stated, and on or about November 15, 1920, wrongfully and without authority from plaintiff, transferred said check to the defendant; that thereafter on or about November 16, 1920, defendant presented said check to the bank on which the same was drawn, and said drawee bank paid said defendant the face amount of said check, to-wit: the sum of \$1,005.96, and on the date of said payment charged said sum to plaintiff's account at said drawee bank, and said sum has ever since remained charged to plaintiff's said account; that defendant has at no time paid plaintiff, or credited plaintiff's account with, any sums whatever on account of said check or the proceeds thereof.

VI.

That by reason of the matters and things aforesaid defendant did on or about said November 16, 1920, receive said sum of \$1,005.96 for plaintiff's use and to

which plaintiff was, and is, entitled in right and justice, and defendant did on said date become justly indebted to plaintiff in said sum of \$1,005.96, which sum and no part thereof has been paid plaintiff by defendant although the same has been often demanded, and defendant has, by its letter of August 20, 1921, refused to pay said sum or any part thereof.

Plaintiff for its tenth cause of action against said defendant alleges:

I.

Realleges the matter contained in Paragraph I of plaintiff's first cause of action herein.

II.

Realleges the matter contained in Paragraph II of plaintiff's first cause of action herein.

III.

Realleges the matter contained in Paragraph III of plaintiff's first cause of action herein.

IV.

That on or about November 10, 1920, plaintiff at Seattle, Washington, through its agents engaged in conducting plaintiff's business branch in said city and state, drew its check, being No. G.624, on the Union National Bank, a banking corporation of Seattle, Washington, payable to itself in the amount of \$1,963.09; that said

check was transmitted in the usual course of business by plaintiff's said Seattle branch to plaintiff's Portland branch; that said check was received by plaintiff's agents conducting plaintiff's business at Portland, Oregon, and the same was endorsed for the purpose of deposit by rubber stamp endorsement on the back thereof as follows:

Pay to the Order of
First National Bank
335 Portland, Ore. 355
General Cigar Co., Inc.
M. A. Gunst Co., Inc.
M. A. Gunst & Co.

that said special endorsement above set forth was one uniformly and continuously theretofore used by the plaintiff for purposes of deposit in the defendant Bank, and was in the form prescribed and recommended by said defendant Bank, and by the Portland Clearing House Association, of which said defendant Bank was at all times herein mentioned a member, as the form to be used for purposes of deposit.

V.

That thereafter one N. W. Turrell wrongfully and without authority from plaintiff, took and converted to his own use said check endorsed as above stated, and on or about November 13, 1920, wrongfully and without authority from plaintiff, transferred said check to the defendant; that thereafter on or about November 16,

1920, defendant presented said check to the bank on which the same was drawn, and said drawee bank paid said defendant the face amount of said check, to-wit: the sum of \$1,963.09, and on the date of said payment charged said sum to plaintiff's account at said drawee bank, and said sum has ever since remained charged to plaintiff's said account; that defendant has at no time paid plaintiff, or credited plaintiff's account with, any sums whatever on account of said check or the proceeds thereof.

VI.

That by reason of the matters and things aforesaid defendant did on or about said November 16, 1920, receive said sum of \$1,963.09 for plaintiff's use and to which plaintiff was, and is, entitled in right and justice, and defendant did on said date become justly indebted to plaintiff in said sum of \$1,963.09, which sum and no part thereof has been paid plaintiff by defendant although the same has been often demanded, and defendant has, by its letter of August 20, 1921, refused to pay said sum or any part thereof.

Plaintiff for its eleventh cause of action against said defendant alleges:

I.

Realleges the matter contained in Paragraph I of plaintiff's first cause of action herein.

II.

Realleges the matter contained in Paragraph II of plaintiff's first cause of action herein.

III.

Realleges the matter contained in Paragraph III of plaintiff's first cause of action herein.

IV.

That on or about November 26, 1920, plaintiff at Seattle, Washington, through its agents engaged in conducting plaintiff's business branch in said city and state, drew its check, on the Union National Bank, a banking corporation of Seattle, Washington, payable to itself in the amount of \$1,140.85; that said check was transmitted in the usual course of business by plaintiff's said Seattle branch to plaintiff's Portland branch; that said check was received by plaintiff's agents conducting plaintiff's business at Portland, Oregon, and the same was endorsed on the back thereof as follows:

Pay to the Order of
First National Bank
335 Portland, Ore. 335
General Cigar Co., Inc.
M. A. Gunst Branch
M. A. Gunst & Co.

that said special endorsement above set forth was one uniformly and continuously theretofore used by the plaintiff for purposes of deposit in the defendant Bank, and was in the form prescribed and recommended by said

defendant Bank, and by the Portland Clearing House Association, of which said defendant Bank was at all times herein mentioned a member, as the form to be used for purposes of deposit.

V.

That thereafter one N. W. Turrell wrongfully and without authority from plaintiff, took and converted to his own use said check endorsed as above stated, and on or about December 2, 1920, wrongfully and without authority from plaintiff, transferred said check to the defendant; that thereafter on or about December 3, 1920, defendant presented said check to the bank on which the same was drawn, and said drawee bank paid said defendant the face amount of said check, to-wit: the sum of \$1140.85, and on the date of said payment charged said sum to plaintiff's account at said drawee bank, and said sum has ever since remained charged to plaintiff's said account; that defendant has at no time paid plaintiff, or credited plaintiff's account with, any sums whatever on account of said check or the proceeds thereof.

VI.

That by reason of the matters and things aforesaid defendant did on or about said December 3, 1920, receive said sum of \$1,140.85 for plaintiff's use and to which plaintiff was, and is, entitled in right and justice, and defendant did on said date become justly indebted to plaintiff in said sum of \$1,140.85, which sum and

no part thereof has been paid plaintiff by defendant although the same has been often demanded, and defendant has, by its letter of August 20, 1921, refused to pay said sum or any part thereof.

WHEREFORE plaintiff demands that it do have and recover judgment of and from said defendant in the sum of \$1,293.58, with interest thereon at the rate of 6% per annum from December 18, 1919; in the further sum of \$467.13 with interest thereon at the rate of 6% per annum from January 22, 1920; in the further sum of \$2,334.01 with interest thereon at the rate of 6% per annum from February 2, 1920; in the further sum of \$160.94 with interest thereon at the rate of 6% per annum from March 18, 1920; in the further sum of \$998.53 with interest thereon at the rate of 6% per annum from April 9, 1920; in the further sum of \$713.49 with interest thereon at the rate of 6% per annum from April 28, 1920;

* * * *

in the further sum of \$1,005.96 with interest thereon at the rate of 6% per annum from November 16, 1920; in the further sum of \$1,963.09 with interest thereon at the rate of 6% per annum from November 16, 1920; and in the further sum of \$1,140.85 with interest thereon at the rate of 6% per annum from December 3, 1920, and for its costs and disbursements herein.

DEY, HAMPSON & NELSON,
GEO. L. BULAND,

Attorneys for Plaintiff.

(The seventh and eighth causes of action are here omitted pursuant to Stipulation hereinafter appearing, for the reason that said causes of action were dismissed by Plaintiff with the consent of Defendant prior to trial.)

On December 29th, 1921, there was filed to said Complaint, the following Demurrer.

Comes now the Defendant above named and demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's first cause of action, for the reason that said portion does not state a cause of action against the Defendant upon which this Plaintiff can recover.

II.

Demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's second cause of action, for the reason that said portion does not state a cause of action against the Defendant upon which this Plaintiff can recover.

III.

Demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's third cause of action, for the reason that said portion does not state a cause of action against the Defendant upon which this Plaintiff can recover.

IV.

Demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's fourth cause of action, for the

reason that said portion does not state a cause of action against the Defendant upon which this Plaintiff can recover.

V.

Demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's fifth cause of action, for the reason that said portion does not state a cause of action against the Defendant upon which this Plaintiff can recover.

VI.

Demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's sixth cause of action, for the reason that said portion does not state a cause of action, against this Defendant upon which this Plaintiff can recover.

VII.

Demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's seventh cause of action, for the reason that said portion does not state a cause of action against this Defendant upon which this Plaintiff can recover.

VIII.

Demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's eighth cause of action, for the reason that said portion does not state a cause of action

against this Defendant upon which this Plaintiff can recover.

IX.

Demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's ninth cause of action, for the reason that said portion does not state a cause of action against this Defendant upon which this Plaintiff can recover.

X.

Demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's tenth cause of action, for the reason that said portion does not state a cause of action against this Defendant upon which this Plaintiff can recover.

XI.

Demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's eleventh cause of action, for the reason that said portion does not state a cause of action against this Defendant upon which this Plaintiff can recover.

XIII.

Demurs to Plaintiff's Complaint herein for the reason that said Complaint does not state facts sufficient to constitute cause of action against this Defendant.

DOLPH, MALLORY, SIMON & GEARIN
and **EDGAR FREED,**

Attorneys for Plaintiff.

I, Edgar Freed, hereby certify that I am one of the Attorneys for the Defendant in the above entitled action, and that in my opinion the foregoing Demurrer is well founded.

EDGAR FREED.

That thereafter, on December 19, 1921, there was rendered on said Demurrer, by Honorable Robert S. Bean, Judge of said Court, the following

OPINION

This is an action to recover for money had and received and submitted on the demurrer to the complaint, from which it appears that the plaintiff is engaged in business at Spokane, Seattle and Portland. The Spokane and Seattle branches drew drafts on their local bank payable to the plaintiff, transmitted the same to the Portland branch, where the drafts were regularly endorsed as follows: "Pay to the order of the First National Bank, Portland, Oregon," and that that such endorsements were in form uniformly and continuously used by the plaintiff for the purposes of deposit in the defendant bank and was the form prescribed and required by the bank and by the Portland Clearing House.

After the drafts had been thus endorsed one Turrell, without authority from plaintiff, wrongfully took possession of the drafts and converted them to his own use, and wrongfully and unlawfully delivered them to the defendant bank, and defendant thereafter presented them, or caused them to be presented to the drawee and they were paid and the defendant bank refused to either

give the plaintiff credit for the amount of the draft or pay the money over to it.

The defendant claims that the plaintiff's remedy in this case is against the drawee bank and not against it. It is argued that because the checks, although specially endorsed to the defendant, were delivered to it by someone not authorized to make such delivery, that the payment by the drawee bank was wrong. But these checks were regularly endorsed by the plaintiff to the defendant bank and was by it presented for payment and paid by the drawee banks in the due course of business, and it seems to me that regardless of the manner in which the checks came into the possession of the defendant bank, that since they were endorsed to it the drawee bank was justified in paying to the holder of the check. The endorsement is not a forgery, but a genuine endorsement, and a special endorsement making the checks payable to the defendant bank, and defendant having presented it and collected the money thereon, it thus received money belonging to the plaintiff and in my judgment should account to it for it.

The demurrer will be overruled.
and Order was duly entered in the Journal of said court, overruling said Demurrer.

That thereafter, on January 3, 1922, there was served and filed the following

ANSWER

(Pursuant to the Stipulation of parties herein-after appearing, the Defendant's answers to Plaintiff's

first cause of action only are herein printed. The answers to the remaining causes of action contain the same denials, admissions and affirmative allegations as the answers to the first cause of action, the only variations being those rendered appropriate by reason of the difference in dates and amounts of the checks concerned in the various causes of action.)

Comes now the Defendant, the First National Bank of Portland, and for Answer to the first cause of action set out in Plaintiff's Complaint herein, admits, denies and alleges as follows:

I.

Admits all the allegations in Paragraphs I, II and III of said first cause of action.

II.

Denies each and every allegation of Paragraph IV of said first cause of action, except as the same is hereinafter admitted.

III.

Denies each and every allegation of Paragraph V of said first cause of action, except as the same is hereinafter admitted.

IV.

Denies each and every allegation in Paragraph VI of said first cause of action.

And this Defendant for a first, further and separate defense herein to said first cause of action, alleges:

I.

That on the 23rd day of July, 1919, and for a long time prior thereto, Plaintiff was and ever since said time has been engaged in business in the City of Portland, Oregon; that during all of said time Plaintiff had three separate accounts in this Defendant's Bank, which accounts were designated: first, "General Cigar Co., Inc.—Regular Account"; second, "General Cigar Co., Inc.—Special Account"; third, "General Cigar Co., Inc.—Special Account Benson Hotel Cigar Stand," and which accounts were designated: first, "General Cigar out or otherwise withdrawn by Plaintiff, or its duly authorized agents.

II.

That on the 23rd day of July, 1919, the Plaintiff in writing duly authorized Julius Louisson and N. W. Turrell, or either of them, to demand and receive from the Defendant, and authorized the Defendant to pay to said Julius Louisson and N. W. Turrell, or either of them, any moneys which the Plaintiff had in the Defendant's bank under any of the accounts above-enumerated.

III.

That said several authorizations—in effect powers of attorney—to said N. W. Turrell were in full force and

effect on the 15th day of December, 1919, and on said day said N. W. Turrell was the agent of the Plaintiff, fully authorized to demand and receive from Defendant all moneys in Defendant's bank standing in the name of, or belonging to Plaintiff, or in either of said several accounts.

IV.

That on the 13th day of December, 1919, Plaintiff, at Spokane, Washington, drew its check No. 397 for \$1293.58 on the Spokane & Eastern Trust Company, a banking corporation, of Spokane, Washington, payable to itself, and sent said check to Portland, Oregon, where it was received by the Plaintiff's agent and representative N. W. Turrell; that said N. W. Turrell on behalf of and as the act of the Plaintiff, thereupon endorsed said check as follows:

Pay to the Order of
First National Bank
335 Portland, Ore. 335
General Cigar Co., Inc.
M. A. Gunst Branch,
M. A. Gunst & Co.

which was the customary form used by said N. W. Turrell and by the Plaintiff in endorsing checks either for payment or deposit. That said N. W. Turrell was fully authorized by Plaintiff to so endorse said check.

V.

That said N. W. Turrell acting as Plaintiff's agent

as above set out on the 15th day of December, 1919, presented said check so endorsed to this Defendant and requested this Defendant to pay to said N. W. Turrell for Plaintiff the sum of \$1293.58 and to transmit said check to Spokane & Eastern Trust Company, at Spokane, Washington, where it would be taken up and paid by said Spokane & Eastern Trust Company, and the amount would be charged to Plaintiff's account in said Spokane & Eastern Trust Company. That on said date this Defendant paid to said N. W. Turrell as the agent of Plaintiff the sum of \$1293.58 and accepted said check.

VI.

That said N. W. Turrell all of said times was the cashier and manager of Plaintiff's business at Portland, Oregon, and as such cashier and manager and by reason of the authorization above set out had full authority from the Plaintiff to endorse said check in the manner above set out, and to collect and receive said money from this Defendant.

And this Defendant for a second further and separate defense herein to said first cause of action alleges:

I.

Restates the allegations of Paragraph I of the first further and separate defense.

II.

Restates the allegations of Paragraph II of the first

further and separate defense.

III.

That ever since said authorization on the 23rd day of July, 1919, said N. W. Turrell had been in the habit of drawing checks in the name of Plaintiff against said several accounts above mentioned and this Defendant always paid same when so drawn; and that ever since said 23rd day of July, 1919, said N. W. Turrell had been in the habit of endorsing checks payable to Plaintiff's order in the same manner as he endorsed the check sued on in this cause of action and presenting same when so endorsed to this Defendant for payment. And this Defendant because of said authorization above mentioned and because of the authority vested in said N. W. Turrell by the Plaintiff always cashed said checks when so presented and delivered the money to said N. W. Turrell for the Plaintiff; and the said checks were thereupon paid to this Defendant by the respective drawee banks and charged to the Plaintiff's account.

IV.

That a proper audit or check of its books and business at Portland, Oregon, and Spokane, Washington, and the accounts of the said N. W. Turrell would have shown to the Plaintiff the practice and doing of said N. W. Turrell as above set out.

V.

That during all the times herein mentioned from

July 23, 1919, up to the 15th day of December, 1919, Plaintiff in addition to said three accounts carried in Defendant's bank, carried an account in the Spokane & Eastern Trust Company, at Spokane, Washington, the drawee of the check sued on in this cause of action. That during all said times there were monthly statements rendered and settlements made between Plaintiff and this Defendant, and between Plaintiff and said Spokane & Eastern Trust Company, and at such settlement Plaintiff's cancelled checks and itemized statements of Plaintiff's account with the respective banks were returned to it by this Defendant and by said Spokane & Eastern Trust Company, and an account stated was had each month between Plaintiff and this Defendant and between Plaintiff and said Spokane & Eastern Trust Company.

VI.

That Plaintiff at no time before the 1st day of January, 1921, made any objection to said payments by the Defendant, or claimed that said Turrell was without authority to so receive the money on said checks; and the Plaintiff by its silence ratified and confirmed the acts and doings of said N. W. Turrell in drawing checks on Plaintiff's accounts with the Defendant and in so endorsing checks and receiving the cash thereon, and by said silence this Defendant was led to believe that said N. W. Turrell had such authority.

VII.

That Defendant because of the facts above stated paid to said N. W. Turrell as agent for the Plaintiff the sum of \$1293.58 when he presented to the Defendant the check sued on in the first cause of action herein, and the Plaintiff is now estopped to deny that said N. W. Turrell had authority to receive such payment.

And this Defendant for a third further and separate defense herein to said first cause of action, alleges:

I.

That this Defendant is informed and believes and therefore alleges to be a fact that when the Defendant paid over to said N. W. Turrell for the Plaintiff the sum of \$1293.58 as set out in Defendant's first further and separate defense herein, said N. W. Turrell misappropriated same.

II.

That the Plaintiff learned of said fraud of said N. W. Turrell a long time prior to the 20th day of July, 1921, but said Plaintiff did not notify this Defendant of the said fraud of said N. W. Turrell until the 20th day of July, 1921.

III

That by Plaintiff's failure to promptly notify the Defendant of said fraud, the burden of which it now seeks to throw upon this Defendant, this Defendant was deprived of the opportunity to proceed against said

wrong-doer and thereby obtain from him restitution to this Defendant of the \$1293.58 which he obtained from the Defendant as set out in the Defendant's first further and separate defense herein until it was too late for Defendant to recover anything from said N. W. Turrell.

And Defendant for a fourth further and separate defense herein to said first cause of action, alleges that the Defendant is entitled to relief herein growing out of facts requiring the interposition of a Court of Equity and material to its defense in this, that this Defendant is informed and believes and therefore states the facts to be:

I.

That when this Defendant paid over to N. W. Turrell for the Plaintiff the said sum of \$1293.58 as set out in Defendant's first further and separate defense herein, said N. W. Turrell misappropriated said moneys and failed to pay the same over to the Plaintiff.

II.

That said N. W. Turrell purchased with said money the hereinafter described property:

The South Half of Lot One in Block Seven in Tilton's Addition to the City of Portland, Ore.

One 1920 Five Passenger Buick Touring Automobile, Factory Number 641498, Motor Number 630779.

One Cheney Electric Phonograph.

Equity in a Chickering Ampico Player Piano.
One Solitaire Diamond Ring.

III.

That on the 28th day of May, 1921, the said N. W. Turrell confessed to the Plaintiff that he had embezzled this and other moneys belonging to the Plaintiff.

IV.

That on or about the 10th day of June, 1921, said N. W. Turrell turned over to the Plaintiff at Plaintiff's demand and to make good this and other misappropriations, all the above described property, together with all the moneys said N. W. Turrell had on deposit in the United States National Bank of Portland; various claims and notes in favor of said N. W. Turrell; and other property, the description and value of which this Defendant is unable to give; and Defendant now says that if it should be determined by this Court that Defendant had no right to pay to said N. W. Turrell said sum of \$1293.58, it should also be decreed that Plaintiff received said property, money and claims above mentioned for Defendant's use and benefit and that Defendant is entitled to a decree herein directing a sale of said property above mentioned and an application of the proceeds thereof and of said moneys to the discharge of any claim Plaintiff may be adjudged to have because of the matters and things hereinabove and in said first cause of action set out and pleaded.

* * * *

WHEREFORE defendant having fully answered the Plaintiff's Complaint, prays that it be hence dismissed without delay and recover of and from the Plaintiff a Judgment for its costs and disbursements; and the Defendant prays that if it should be determined by this Court that the defendant had no right to pay to said N. W. Turrell any of the checks described in said eleven causes of action, it be decreed that Plaintiff received said property, money and claims described in the fourth further and separate defense to each of said causes of action, for Defendant's use and benefit, and that said property be sold and the proceeds therefrom, and said moneys, be applied to discharge any claim plaintiff may be adjudged to have because of the matters and things in said Complaint set forth.

DOLPH, MALLORY, SIMON & GEARIN,
and EDGAR FREED,

Attorneys for Defendant.

That thereafter, on January 18, 1922, Plaintiff filed the following

DEMURRER

Comes now the plaintiff in the above entitled court and cause and

I.

Demurs to defendant's third further and separate defenses to plaintiff's first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh causes

of action, on the ground and for the reason that said defenses do not state facts sufficient to constitute defenses to said causes of action.

II.

Demurs to defendant's fourth further and separate defenses to plaintiff's first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh causes of action, on the ground and for the reason that said defenses do not state facts sufficient to constitute defenses to said causes of action.

In presenting the first of said demurrers plaintiff will contend that it was under no duty to notify defendant of said fraud on the part of said N. W. Turrell, and further it is not alleged that defendant could have obtained restitution if so informed.

In the presentation of the second of said demurrers plaintiff will contend that the defendant's fourth defenses do not contain allegations that plaintiff applied the property received from N. W. Turrell in payment of the claims for which this action is brought, and that plaintiff was under no legal obligation to so apply said property.

DEY, HAMPSON & NELSON,
GEO. L. BULAND,

Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, G. L. Buland, one of attorneys for plaintiff, do

hereby certify that the above demurrers are not interposed for the purposes of delay, and that in my opinion the same are well founded in law.

GEO. L. BULAND.

That thereafter an order was entered pursuant to Stipulation of parties, allowing plaintiff to withdraw said Demurrer so far as it related to the fourth affirmative answers and defenses to plaintiff's causes of action, but allowing it to stand as to the third affirmative answers and defenses. On February 27, 1922, there was rendered by Hon. Charles E. Wolverton, Judge of said court, the following

OPINION

It is averred by the third defense that plaintiff was apprised of Turrell's fraud a long time prior to its notification of the defendant, and that, by reason thereof, defendant was deprived of its opportunity to proceed against the wrong-doer, and thereby obtain restitution.

The plaintiff challenges the sufficiency of this answer, and urges that, even if it were plaintiff's duty to speak, the defendant cannot avail itself of the failure to fulfill that duty unless injury has ensued.

The rule seems to be, as it respects loss through forgery, that the opportunity to proceed against the forger is a valuable one, the deprivation of which, by failure to give notice promptly, conclusively determines that loss has resulted, for there is no way by which it can be satisfactorily determined that there was no loss, unless

it be shown there is on hand a fund belonging to the forger out of which the defendant can reimburse himself in whole or in part. *Union Nat. Bank v. Farmers' & Mechanics' Nat. Bank*, 114 At. 506, 507; *McNeely Co. v. Bank of North America*, 221 Pa. 588; *United States v. National Exchange Bank*, 45 Fed. 163.

The present case is of marked analogy. An alleged agent of plaintiff has, through representation that he was such agent, obtained funds from the bank and embezzled them. Applying the rule, it is sufficient if it appears that the plaintiff failed to notify the bank promptly of the agent's want of authority and embezzlement of the funds, and the bank was thus deprived of its opportunity to proceed against the wrong-doer. This constitutes a complete defense without the necessity of showing further that the bank could have recouped if it had been sooner notified.

Demurrer overruled.

An order was duly made and entered as of that date overruling said Demurrer.

That thereafter, on March 28th, 1922, there was filed the following

REPLY

(Pursuant to Stipulation hereinafter appearing, only so much of the Reply is printed herein as relates to the defendant's answer to plaintiff's first cause of action, the Reply to the remaining causes of action being the same as to the first cause of action with such variations as were rendered appropriate by reason of the variation

in amounts and dates of the checks involved.)

Comes now the plaintiff in the above entitled court and cause and in reply to defendant's first further and separate defense to plaintiff's first cause of action:

I.

Admits that plaintiff was engaged in business in the City of Portland, Oregon, and had accounts in defendant bank as set forth in Paragraph I thereof, and admits that said accounts were at all times subject to withdrawal by plaintiff and denies each and every other allegation therein contained.

II.

Denies each and every allegation contained in Paragraph II thereof, except as the same are herein alleged to be true and in this respect avers that the only authority conferred by plaintiff on said N. W. Turrell in respect to the withdrawal of moneys from, or other dealings with, said defendant in behalf of plaintiff was the authority granted him by reason of letter of July 23, 1919, from plaintiff to said defendant as follows:

"Portland, Ore., July 23, 1919.

First National Bank,
Portland, Oregon.

Gentlemen:

Please be advised that the signatures of Julius Louisson and N. W. Turrell (that is, either of them) are authorized to sign checks drawn on the following accounts:

GENERAL CIGAR COMPANY INC.—REG-
ULAR ACCOUNT

GENERAL CIGAR COMPANY INC—SPE-
CIAL ACCOUNT

BENSON HOTEL CIGAR STAND

These instructions cancel the signature of Charles W. Hamilton, who is no longer in our employ at this Branch.

Following the signing of this letter, you will find the signatures of the two parties hereinabove mentioned.

Yours very truly,

GENERAL CIGAR CO. INC.,

M. A. Gunst Branch.

JL:LS

By (Signed) Julius Louisson,

Julius Louisson

Assistant Secretary and

N. W. Turrell

Sales Manager.

Cashier”

III.

Denies each and every allegation contained in Paragraph III thereof, except plaintiff admits that such authority as was conferred by the letter set forth in Paragraph II was in force and effect December 15, 1919, and that said N. W. Turrell had special authority to act for plaintiff to the extent and in the precise manner described in said letter.

IV.

Admits the allegations contained in Paragraph IV

thereof beginning at the first of said paragraph and ending with the endorsement set forth in words and figures on lines 26 and 29 of page 2 of said Answer. Denies each and every other allegation therein contained, except that plaintiff admits that said N. W. Turrell was authorized by plaintiff to affix plaintiff's rubber stamp endorsement in the words and figures set forth in Paragraph IV for the purpose of depositing said check to plaintiff's account with defendant bank and permitting the said defendant bank to collect and receive the proceeds of said check for plaintiff's account.

V.

Denies each and every allegation contained in Paragraph V thereof except that plaintiff admits that said N. W. Turrell on December 15, 1919, presented said check endorsed for deposit as above stated to defendant and that defendant paid said N. W. Turrell personally the face of said check, to-wit: \$1293.58.

VI.

Denies each and every allegation contained in Paragraph VI thereof, except that plaintiff admits that the position held by said N. W. Turrell with plaintiff was called "Cashier", and that the said N. W. Turrell had authority to affix to checks received by plaintiff the said rubber stamp endorsement for purposes of deposit and such other authority as was specifically created by the writing set forth in Paragraph II of this reply.

In reply to defendant's second further and separate

defense to plaintiff's first cause of action plaintiff admits, denies and alleges as follows, to-wit:

I.

Replying to Paragraph I hereof repeats and makes a part hereof the admission, denials and allegations made to Paragraph I of defendant's first further and separate defense to said first cause of action.

II.

Replying to Paragraph II thereof repeats and makes a part hereof the admissions, denials and allegations made to Paragraph II of defendant's first further and separate defense to said first cause of action.

III.

Denies each and every allegation contained in Paragraph III thereof, except that plaintiff admits that said N. W. Turrell had ever since July 23, 1919, drawn checks as plaintiff's agent and in plaintiff's name against plaintiff's several accounts above mentioned, and defendant always paid same when so drawn and plaintiff further admits that said N. W. Turrell had without authority from plaintiff and without plaintiff's knowledge obtained from defendant bank the amounts for which the eleven checks described in plaintiff's complaint herein were made payable, notwithstanding said special endorsement for purposes of deposit and plaintiff admits that said checks were thereafter paid to defendant by the respective drawee banks situated in cities other than

Portland and charged by said drawee banks to plaintiff's account therein.

IV.

Denies each and every allegation contained in Paragraph IV thereof.

V.

Admits the allegations contained in Paragraph V thereof, except that plaintiff denies that an account was stated each month between plaintiff and defendant, except in regard to deposits and withdrawals in plaintiff's account with defendant. Denies that an account was stated between plaintiff and said Spokane & Eastern Trust Company, except in regard to the deposits and withdrawals in plaintiff's account in said Spokane & Eastern Trust Company.

VI.

Denies each and every allegation contained in Paragraph VI thereof, except that plaintiff admits that at no time before the 1st day of January, 1921, did it make any objection to said payments by the defendant to said N. W. Turrell personally of the amounts of checks endorsed for deposit, or claim that said Turrell was without authority to so receive or appropriate the sums represented by said checks and in this respect avers that at said times it was without knowledge, information or reason to suspect that said defendant bank had made any such payments to said N. W. Turrell.

VII.

Denies each and every allegation contained in Paragraph VII thereof.

Plaintiff in reply to defendant's third further and separate defense to plaintiff's first cause of action, admits, denies and alleges as follows, to-wit:

I.

Admits the allegations contained in Paragraph I thereof, except that plaintiff denies that plaintiff paid over to N. W. Turrell for plaintiff the sum of \$1293.58, as set forth in defendant's first further and separate defense and alleges that said sum was paid by defendant to said N. W. Turrell as set out in plaintiff's complaint and not otherwise.

II.

Denies each and every allegation contained in Paragraphs II and III thereof.

Plaintiff in reply to defendant's fourth, further and separate defense to plaintiff's first cause of action denies that said defendant is entitled to relief, requiring the interposition of a court of equity, and in regard to the allegations contained in said fourth further and separate defense admits, denies and alleges as follows, to-wit:

I.

Admits the allegations contained in Paragraph I thereof, except that plaintiff denies that defendant paid

over to said N. W. Turrell for plaintiff the sum of \$1293.58, as set out in defendant's first further and separate defense, and alleges that said sum was paid by defendant to N. W. Turrell as set forth in plaintiff's complaint and not otherwise.

II.

Denies each and every allegation contained in Paragraph II thereof.

III.

Admits that on or about May 28, 1921, said N. W. Turrell confessed that he had embezzled large sums from the plaintiff, the exact sum and dates of which embezzlement he, the said Turrell, had obtained from a teller of remember, and that in addition to said acts of embezzlement he, the said Turrell, had obtained from a teller of defendant bank the amount of a number of checks drawn on out of town banks, payable to plaintiff, notwithstanding the fact that said checks were endorsed for deposit, the exact sums and dates of said checks not being remembered by said Turrell. Plaintiff denies each and every other allegation contained in said Paragraph III thereof.

IV.

Denies each and every allegation contained in Paragraph IV thereof, except those herein alleged to be true, and in this respect avers that in addition to the sums which plaintiff seeks to recover from the defendant in

this action, said N. W. Turrell wrongfully took and converted other moneys belonging to plaintiff prior to November 30, 1920, amounting in all to \$7876.25, and said N. W. Turrell was and now is indebted to plaintiff in said sum, and the embezzlement of said sum and the indebtedness of said Turrell to the plaintiff therefore distinct and separate from the indebtedness sought to be recovered in this action. That on or about June 1, 1921, said N. W. Turrell and Dagmar Turrell, his wife, being then the owners of the following described property:

"The south $\frac{1}{2}$ of Lot 1 Block 7 Tilton's Addition
to the City of Portland, Oregon,
1920 5-passenger Buick Touring Car, Serial No. 691498,
1 Cheney Electric Phonograph,
Equity in Player Piano,
1 Diamond Ring,
Equity in contract held in office of Frank L. McGuire,
Deposit in U. S. National Bank, and
Stock in General Cigar Company"

transferred, conveyed and set over said property to said Carl G. Tipton, and subsequently in July, 1921, transferred, conveyed and set over to said Carl G. Tipton the following described property:

"Note of John D. Methol and Beryl Methol for \$200.00,
Note of Standard Tire & Supply Co. Inc. on which \$150.00 was due, with interest.

Claim of \$500.00 against S. K. Brown"; that all of said property was transferred to said Carl G. Tipton upon the trust that he convert the same into cash and pay the proceeds thereof to plaintiff in payment of the sums owing by the said N. W. Turrell to plaintiff, the amount so paid to be applied by plaintiff on such indebtedness of said N. W. Turrell to plaintiff as plaintiff should see fit; that all sums paid over by said Carl G. Tipton to plaintiff pursuant to the aforesaid trust have been applied by plaintiff with the consent and direction of said N. W. Turrell on said indebtedness of \$7876.25, due as aforesaid with interest from said N. W. Turrell to plaintiff and the amounts received by plaintiff have not been sufficient to pay in full said indebtedness of \$7876.25, and that the total value of said assets is less than said indebtedness.

* * * *

WHEREFORE plaintiff prays that it recover judgment of and from the defendant as demanded in its complaint on file herein and that the equitable relief prayed for in defendant's answer be denied.

DEY, HAMPSON & NELSON,
GEO. L. BULAND,

Attorneys for Plaintiff.

That thereafter, on June 5th, 1922, the said cause came on for trial on June 6th, 1922, the following Judgment Order was made and entered:

JUDGMENT ORDER

Portland, Ore., June 6, 1922.

Now, at this day, came the parties hereto, by their counsel, as of yestetrday, whereupon the Jury empanelled herein being present and answering to their names, the trial of this cause is resumed. And said Jury having heard the evidence adduced, the arguments of counsel and the charge of the court, retire in charge of proper sworn officers to consider of their verdict. And thereafter, said Jury returns to the court the following verdict, viz:

“We, the Jury in the above entitled case, find for the Defendant.

(Signed) CLAUDE I. SCOGGINS,
Foreman.”

which verdict is received by the court and ordered to be filed.

WHEREUPON it is adjudged that plaintiff take nothing by this action; that defendant go hence without pay, and that said defendant do have and recover of and from said plaintiff its costs and disbursements herein, taxed in the sum of \$35.92 and that defendant have execution therefor.

On June 15, 1922, there was made and entered the following

ORDER

Upon appliaction of plaintiff pursuant to stipulation of parties,

IT IS HEREBY ORDERED that the plaintiff may have to and including twenty days from date hereof in which to serve and file motion for new trial in the above entitled action.

IT IS FURTHER ORDERED that plaintiff may have to and including sixty days from date hereof in which to serve and tender bill of exceptions herein.

DATED this 15th day of June, 1922.

CHARLES E. WOLVERTON,
Judge.

On June 28, 1922, there was duly served and filed the following

**NOTICE OF PRESENTATION OF MOTION
FOR NEW TRIAL**

To the above named Plaintiff and to Messrs. Dolph, Mallory, Simon & Gearin, and Edgar Freed, its attorneys:

You will please take notice that on Monday, the 3rd day of July, 1922, at the hour of ten o'clock A. M. or at such time thereafter as may then and therebe fixed by the Court at the Courtroom of the United States District Court in the Post Office Building at Portland, Oregon, before the Honorable C. E. Wolverton, Judge, plaintiff will present his Motion to set aside the verdict and judgment in the above entitled cause, and to grant a new trial thereof upon the grounds set forth in the Notice of Intention to Move for New Trial herewith

Served upon you, and upon the papers and records therein mentioned, and the files of the Clerk herein.

Dated June 28, 1922.

DEY, HAMPSON & NELSON,
GEO. L. BULAND,

Attorneys for Plaintiff.

and the following

NOTICE OF INTENTION TO MOVE FOR NEW TRIAL

To the above named Plaintiff, and to Messrs. Dolph, Mallory, Simon and Gearin, and Edgar Freed, its attorneys, and to the Clerk of said Court:

You will please take notice that the plaintiff intends to move the Court to vacate the verdict and judgment heretofore made and entered in the above entitled cause, and to grant a new trial of said cause for the following causes materially affecting the substantial rights of the defendant, and upon the grounds hereinafter set forth, to-wit:

I.

Because of errors of law occurring at the trial and duly excepted to by the plaintiff in the following particulars:

(a) Instruction to the Jury as follows:

“Now gentlemen of the jury, I instruct you further that the burden of proof lies with the plaintiff to show that the defendant bank paid out money

without authority from the plaintiff, either real or apparent."

It was and is contended by the plaintiff that the burden of proof lies with the defendant to show that it paid out the plaintiff's money upon the plaintiff's authority and the burden is not upon the plaintiff to prove the negative.

(b) Instruction to the Jury as follows:

"As it respects the second answer, it is a rule of law that a depositor must examine the bank's periodical statements and report to the bank without any unreasonable delay any errors he may discover, or the bank may regard his silence as an admission that the entries as shown are correct.

"It is alleged, among other things, that at all times from July 23, 1919, to December 15th of the same year, the plaintiff, in addition to the three accounts carried in the defendant bank, carried accounts in the Spokane & Eastern Trust Company, of Spokane, and the Union National Bank, of Seattle, and that each of these banks, including the defendant bank, rendered a monthly statement to plaintiff of its account therewith; that thereby the plaintiff was advised as to the exact condition of its account in each of these banks, respectively, touching the amounts of money drawn from the bank by Turrell, but made no objection thereto, and gave the bank no information touching any irregularity affecting such accounts.

"If you find from the evidence in the case that

such were the facts, and that the plaintiff was so advised and failed, within a reasonable time, to advise the defendant bank of such irregularities, then the plaintiff would be estopped now to assert that defendant was liable for its acts in paying the money over to Turrell in pursuance of his request or demand, and your verdict should be for the defendant."

The ground of objection on the part of the plaintiff was and is that there was no evidence that an examination of the bank's periodical statements would have disclosed the wrongful transactions on the part of Turrell, but on the contrary the evidence showed that the endorsements upon which the defendant bank paid moneys to Turrell was the endorsement uniformly used by the plaintiff for purposes of deposit; that the said checks would not be returned by the defendant bank but would be returned by the Spokane and Seattle banks to the drawers at said points and there would be nothing in the bank's statements at said points or on the face or reverse of the checks themselves to indicate anything other than deposit in the regular course of business. The instruction is subject to the further objection that it exempts the defendant bank from all liability, even with regard to past transactions which had been consummated before the rendering of any statements.

(c) Instruction to the Jury as follows:

"And in this relation, I further instruct you that a depositor who has permitted his agent to verify the bank's statements is charged with notice of

the fraud which would be disclosed by the examination of such statements, though not with the agent's knowledge of the fraud which he may have acquired otherwise than through such statements.

"If you believe from the evidence a reasonably careful examination of the monthly statements rendered and cancelled vouchers returned to the plaintiff General Cigar Company by the defendant First National Bank and the Spokane & Eastern Trust Company, would have disclosed to the General Cigar Company the fact that the checks involved in the first, fourth, fifth and ninth causes of action had not been credited to the General Cigar Company's account with the First National Bank and if you also believe that prior to July 20, 1921, the General Cigar Company made no objections concerning plaintiff's account with defendant or the cashing of these checks, you must find for the defendant on the first, fourth, fifth and ninth causes of action.

"If you believe from the evidence that a reasonably careful examination of the monthly statements rendered and cancelled vouchers returned to the plaintiff by the First National Bank and the Union National Bank would have disclosed to the General Cigar Company the fact that the checks involved in the second, third, sixth, tenth and eleventh causes of action had not been credited to the General Cigar Company's account with the First National Bank, and if you also believe that prior to July 20, 1921,

the General Cigar Company made no objections concerning plaintiff's account with defendant or the cashing of these checks, you must find for the defendant on the second, third sixth, tenth and eleventh causes of action."

The basis of objection to this instruction is as set out under (b).

(d) Refusal to grant plaintiff's request for Instruction *supra* numbered I, as follows:

"This is an action instituted by General Cigar Company, Inc., a corporation, against First National Bank of Portland, Oregon, a National Banking corporation. It is admitted that both the plaintiff and defendant are incorporated as alleged.

"There are several causes of action in the plaintiff's Complaint and inasmuch as the Answer to each and the Reply to the Answer involve precisely the same issues, I will simply take the first of these and you will understand that what I have to say as to the first applies with equal force to each of the others.

"The General Cigar Company conducted a wholesale and retail cigar and tobacco business in the City of Portland, Oregon and the same corporation had a branch at Spokane, Washington, engaged in a similar line of business. The Spokane branch being indebted to the Portland branch for merchandise, issued its check Payable to the General Cigar Company, Portland, Oregon, in the sum of \$1293.58. This check was drawn on the Spokane

& Eastern Trust Co., a banking corporation of Spokane, Washington. The check was received at the Portland office and there was endorsed upon the check by rubber stamp endorsement the following:

“ ‘Pay to the order of First National Bank
 335 Portland, Oregon 335
 General Cigar Co., Inc.
 M. A. Gunst Branch
 M. A. Gunst & Co.’ ”

“I instruct you that the effect of affixing such a stamp to the back of a check is to make the check payable to a special banking corporation, namely the First National Bank, of Portland, Oregon, and is a method of endorsement commonly utilized for purposes of deposit, and had been so utilized throughout the dealings of the General Cigar Company with the First National Bank.

“It further appears that one Neil W. Turrell, Cashier of the General Cigar Co. had by virtue of a letter or power of attorney from the General Cigar Co., lodged with the First National Bank in July, 1919, been specifically authorized to sign checks on the funds of the General Cigar Co. or deposit with the First National Bank. Turrell took the Spokane check which I have described to you, endorsed as I have said, to the defendant First National Bank, and the defendant First National Bank, to which the check was made payable by endorsement, paid the face amount thereof in cash

to the said Turrell, and then in turn collected the amount of the check from the Bank on which it was drawn, that is, the Spokane & Eastern Trust Company at Spokane. It is admitted that the Bank did not credit the amount of the check to the General Cigar Company's account at Portland, Oregon, and that unless the Bank had authority to pay the cash to Turrell and unless the payment to Turrell was in law and in fact a payment to the General Cigar Company, or unless you should find the bank is released from liability because of other matters to which I shall hereafter advert, the General Cigar Company has not been paid and the First National Bank is indebted to it in the amount of the check. Whether or not such liability exists is the question for you in this case, and it becomes necessary for me to explain to you how an agency is created, what authority an agent ordinarily has, and what are the respective rights and duties of the depositor and of the Bank."

(e) Refusal to grant plaintiff's request for Instruction number II, as follows:

"I instruct you that when a negotiable instrument, such as the check in the case at bar, is endorsed specifically to a banking corporation, that the party having physical possession of such a check has not from the possession of such check alone, any authority to negotiate the same or receive the proceeds thereof."

(f) Refusal to grant plaintiff's request for In-

struction numbered III, as follows:

“I instruct you that an agent has the authority which is actually formally and expressly conferred upon him and the power necessary to carry his instructions into effect, and also such power as he is held out by the principal to the world and to those dealing with him as having. The principal has a right to limit and define this authority and when he does so limit it, the agency for those particular purposes, at least, becomes a special agency, and all persons must have regard to the limitations imposed, and if they deal with the agent on such a special field of agency in any other way than the way prescribed by the principal, the principal is not ordinarily bound. In this case it is not disputed that there was conferred upon the agent, Turrell, by a letter or power of attorney, certain specific authority with reference to checks, i. e., the authority to sign checks on certain designated accounts and to sign these checks in a certain designated way, that is, as Cashier. That thereupon it became the bank's duty to the principal, the General Cigar Company, to decline to cash any checks on the funds of the depositor save and except those executed in the manner specified in the power of attorney, unless it has been shown to you that other or broader authority was conferred in some effective manner.

(g) Refusal to grant plaintiff's request for Instruction numbered IV, as follows:

“I instruct you that the letter or power of at-

torney was silent on the subject of endorsements; that the rubber stamp endorsement making a check received by a depositor on an out of town bank payable to the order of the local bank in which he deposits, is one not required to be affixed by the principal himself or by any one holding any special powers and passes title to the fund to the depository bank alone. When the check is so stamped and is deposited with the bank to which it is made payable, by the rubber stamp endorsement, it is placed to the credit of the depositor and no question ordinarily arises as to the individual or the authority of the individual affixing the rubber stamp."

(h) **Refusal to grant plaintiff's request for Instruction numbered V, as follows:**

"In this case it is claimed by the Defendant Bank that the rubber stamp which I have described was used for another purpose than that of deposit, that is that it was used for the purpose of obtaining cash over the counter and that Turrell, to whom I have referred, had authority from the plaintiff, General Cigar Co., to obtain through the use of said rubber stamp endorsement, cash from the Defendant Bank on checks received by the General Cigar Co. drawn on out of town banking institutions. I instruct you that the burden of proof is on the defendant First National Bank, to show that Turrell had the authority which the Bank claims. There is no presumption of such authority. Neither the letter of July, 1919, authorizing Turrell to sign

checks, nor the fact that he or other employees could stamp out of town checks payable to the order of the First National Bank creates of itself any authority on Turrell to obtain cash on such facts and it is incumbent upon the defendant, First National Bank, seeking to justify payment of cash to Turrell thereon, to prove to you by a preponderance of evidence that Turrell had such authority.

"In considering the question of whether or not such authority existed, you are not only entitled, but it is your duty to consider all the facts in testimony and the circumstances surrounding the parties and attending the transactions and to determine from such a consideration whether or not the bank has established Turrell's authority to cash said checks and the Bank's right to pay them instead of placing them to the credit of its depositor, General Cigar Company. The Bank can justify itself and prevent a recovery in this case only by proving that the money was placed to the credit of the General Cigar Company or was otherwise used for the benefit of the General Cigar Company, and, it being admitted that it was not credited to the General Cigar Company but was paid to Turrell, the Bank must show that when it made a payment to Turrell it was under Turrell's authority paying the money to the General Cigar Company."

(i) Refusal to grant plaintiff's request for Instruction numbered VI, as follows:

“I instruct you that the letter or power of attorney of July, 1919, clearly required the signature for the General Cigar Co. of two persons, Julius Louisson, the Manager, or Neil W. Turrell, Cashier, and that meant their signature in a representative capacity, as manager or cashier respectively, and not merely as individuals. There has been no testimony to show any authority to the Bank or any practice or course of dealing between the parties which would justify the bank in paying out cash on a rubber stamp signature without the personal signature of either the manager or cashier as such, unless it can be said that the payment of the amount of the several checks involved in this case to Turrell created or constituted, because of failure of the General Cigar Company, to object, such authority on the part of Turrell.”

(j) Refusal to grant plaintiff's request for Instruction numbered VII, as follows:

“I instruct you that, in order for a person to be called upon to object to a wrongful or unauthorized course of practice it is necessary that he know the facts and know the practice, or that a reasonably prudent person or concern under similar circumstances would have had such knowledge in an ordinarily intelligent conduct of his or its affairs. The question therefore becomes one of fact for you to determine and the burden of proof in this regard is also upon the defendant, First National Bank, to

show that the General Cigar Company, by giving in the matter of the Seattle and Spokane checks the attention and care which a reasonably prudent person under similar circumstances would have given them, would have discovered sooner than the General Cigar Company did discover, the method in which cash was withdrawn from the Defendant Bank on said out of town checks. The test in this regard is not what would have been discovered by the highest conceivable degree of care or by the investigation of a person abnormally suspicious, but only the care which an ordinarily prudent person or concern may reasonably be held to be bound to devote to its business and affairs under similar circumstances.”

(k) Refusal to grant plaintiff’s request for Instruction numbered VIII, as follows:

“In considering the question submitted to you by the foregoing Instruction, I instruct you that the checks which form the basis of this action and for which Turrell received cash from the First National Bank were drawn on out of town banks other than the defendant bank. The statements received monthly by the plaintiff from the Defendant Bank indicated only the state of the plaintiff’s account with the Defendant Bank and did not tend to indicate the state of the accounts on which the checks in question were drawn. Therefore, from an examination of those statements alone, the wrongful

acts of Turrell in question would not be shown to the plaintiff, nor could it thereby discover such wrongful acts of Turrell in cashing the checks in question. It would be necessary for the plaintiff to check its accounts with the books of the out of town branches and the accounts that such branches had with the banks with which they did business. It is for you to determine as a question of fact whether the plaintiff exercised reasonable care or was negligent in its system of checking the transactions between its Portland branch with the accounts from the various other branches. It is to be observed by you that the checks returned to the Spokane branch by the Spokane bank of deposit and to the Seattle branch by the Seattle bank of deposit, would not present any reason to believe that an irregularity had occurred since the Spokane and Seattle banks had a right, when receiving the checks through the First National Bank of Portland, with the approved rubber stamp endorsement of the General Cigar Company at Portland of the order of the First National Bank, to assume that these had passed through the hands of the First National Bank in a regular, proper and orderly manner and the Spokane and Seattle banks hand the right to charge the amount of these checks against their respective depositors at those points."

(1) Refusal to grant plaintiff's request for Instruction numbered IX, as follows:

“The Defendant Bank as one of its defenses in this case asserts that the plaintiff, General Cigar Company knew of the course of conduct on the part of Turrell with reference to the checks in suit, for a long time prior to communicating that knowledge to the Defendant Bank and that the Bank was thereby deprived of an opportunity to recover all or a part of the loss. I instruct you that by facts stipulated in this case, it appears that all of Turrell’s property was attached by the General Cigar Company at a time when it knew only of Turrell’s embezzlement by means of checks payable to cash, not involved in this action, and that shortly thereafter the property so attached and all of Turrell’s property acquired during the period of defalcation, was turned over to one J. H. Tipton as Trustee and that the question of the application of the proceeds of said property is one of law upon which this court will pass, the facts being admitted and it affirmatively appears from such admitted facts that no harm has resulted to the First National Bank by reason of any such alleged delay. I instruct you, therefore, to disregard the third further and separate defense on the subject of loss to the Bank through alleged delay in notifying it of the claim which is the subject of this action.”

(m) Refusal to grant plaintiff’s request for Instruction numbered IX $\frac{1}{2}$, as follows:

“(If the instruction No. IX foregoing is refused by the Court, the plaintiff desires to be al-

lowed an exception to such refusal, and asks without waiving its objection to the denial of the foregoing, in the event of its refusal, that the following instruction be given.)

“One of the defenses advanced by the Defendant Bank is that the plaintiff delayed unreasonably in informing it of the course of conduct on the part of Turrell with reference to the checks in suit. It was the duty of the plaintiff, General Cigar Company within a reasonable time after ascertaining the facts, to communicate them to the Bank. The General Cigar Company had the right to make such inquiry as was necessary to ascertain the facts and was charged with the duty of making such inquiry with diligence. It could not be required to give notice as to the amounts claimed to have been diverted until, as a result of diligent inquiry, it had the opportunity to know them itself. In order to sustain this defense on the part of the Bank, therefore, it must appear to you from a preponderance of the evidence that the General Cigar Company, after having reason to suspect the facts in connection with the checks in suit, delayed unreasonably in compiling the data on the subject and in communicating the result of its investigation and inquiry to the First National Bank. If you believe that the first intimation on the subject came from Turrell’s confession at the end of May, 1921, and that the wires were used in the effort to ascertain the facts and that copies of documents had to be procured

from the various banks and an accounting and audit were essential, and that the data could not reasonably be compiled short of June 20th, at which date the bank was given formal notice of the amount of the several checks, then I instruct you that the General Cigar Company acted with reasonable diligence and the Bank cannot avoid liability under that defense."

* * * *

To the giving of each of said instructions by the Court exception was duly taken and allowed and to the refusal to give the instructions requested by the Plaintiff exceptions were likewise duly taken and allowed.

II.

That the verdict is not in accordance with the weight of evidence in that the evidence required at the jury's hands a finding in favor of the Plaintiff on cause of action arising before the rendering of any monthly statements or before the theory of estoppel could be invoked, because of failure to ascertain the facts as to Turrell's conduct and to act on such information.

Dated at Portland, Ore., June 28, 1922.

DEY, HAMPSON & NELSON,

Attorneys for Plaintiff.

GEO. L. BULAND,

Attorney for Defendant.

I, Roscoe C. Nelson, certify that I am one of the Attorneys of record for the Plaintiff in the above entitled matter; that said Motion is presented in good faith and I believe same to be well founded in law.

ROSCOE C. NELSON.

That thereafter, on July 17th, 1922, said Motion was duly argued by counsel and there was made and entered the following

ORDER DENYING MOTION FOR NEW
TRIAL

July 17, 1922.

Now at this day, this cause comes on to be heard by the court on the motion of Plaintiff above named for a New Trial herein, Plaintiff appearing by Mr. Roscoe C. Nelson of counsel, and Defendant by Mr. John Gearin and Mr. Edgar Freed, of counsel, and the Court having heard the arguments of counsel, upon consideration thereof,

IT IS ORDERED that said motion be and the same is hereby denied.

That thereafter, on August 10th, 1922, there was made and entered the following

ORDER

Pursuant to Stipulation of parties hereto,

IT IS HEREBY ORDERED, that plaintiff may have to and including October 1, 1922, within which to

serve and tender its Bills of Exceptions herein.

Dated this 10th day of August, 1922.

C. E. WOLVERTON,

Judge.

That thereafter, on September 25th, there was made and entered the following

ORDER.

Pursuant to Stipulation of the parties hereto,

IT IS HEREBY ORDERED that Plaintiff may have to and including October 31st, 1922, within which to serve and tender its Bill of Exceptions herein.

DATED this 25th day of September, 1922.

CHAS. E. WOLVERTON,

Judge.

That thereafter, prior to the 31st day of October, 1922, there was served, tendered and lodged with the Clerk of said Court, a Bill of Exceptions, and thereafter, on November 14, 1922, the Court settled, allowed and approved the following

BILL OF EXCEPTIONS.

BE IT REMEMBERED that the foregoing cause came on to be heard on the 5th day of June, 1922, before Hon. Charles E. Wolverton, Judge of the above entitled court, Plaintiff appearing by its duly authorized agents and Dey, Hampson & Nelson, Roscoe C. Nelson and G. L. Buland, its Attorneys, and Defendant by its duly authorized agent and Dolph, Mallory, Simon &

Gearin, John M. Gearin and Edgar Freed, its Attorneys.

Thereupon a Jury was empanelled for the trial of said cause.

A Stipulation was entered into between the parties, in respect to the Defendant's Fourth Affirmative Defense which eliminated said Defense from consideration by the Jury.

It was further agreed and stipulated by said parties that the seventh and eighth causes of action in Plaintiff's Complaint should be dismissed and the prayer of plaintiff's Complaint amended to eliminate demand for judgment on the two items concerned in said causes of action, and order to that effect was made by the Court.

TESTIMONY.

Julius Louisson, Witness for Plaintiff.

Mr. Julius Louisson was the first witness called on behalf of Plaintiff. He testified that he was the manager of the Portland Branch of the General Cigar Company and had been associated with the General Cigar Company and its predecessors for many years. He testified that Mr. Neil W. Turrell was first employed by the General Cigar Company in the capacity of bookkeeper; that thereafter, on July 1, 1919, he was promoted to Cashier of the Portland office of General Cigar Company. His duties in that office were to have charge of the cash and was head office clerk, and authority was conferred upon him by the General Cigar

Company with reference to the signing of checks on the First National Bank, which authority was conferred in a letter written the First National Bank. This letter was introduced in evidence as Plaintiff's "Exhibit 1" without objection, and is as follows:

"GENERAL CIGAR CO., INC.

M. A. GUNST BRANCH

84 N. 5th St.

Portland, Ore., July 23, 1919.

First National Bank,

Portland, Oregon.

Gentlemen:

Please be advised that the signatures of Julius Louisson and N. W. Turrell (that is, either of them) are authorized to sign checks drawn on the following accounts:

GENERAL CIGAR COMPANY, INC.—

REGULAR ACCOUNT

GENERAL CIGAR COMPANY, INC.—

SPECIAL ACCOUNT

BENSON HOTEL CIGAR STAND.

These instructions cancel the signature of Charles W. Hamilton, who is no longer in our employ at this Branch.

Following the signing of this letter, you will find the signatures of the two parties hereinabove mentioned.

Yours very truly,

GENERAL CIGAR CO., INC.,

M. A. GUNST BRANCH,

By Julius Louisson,

Assistant Secretary and Sales Manager.

JL:LB

N. W. Turrell, Cashier."

Mr. Louisson testified that the signature appearing on said letter were his own and Mr. Neil W. Turrell's; that he was the only one in connection with the Company who was authorized to give any power to Mr. Turrell and that no additional or enlarged or different powers were given to Mr. Turrell by any writing; that there was no other power of attorney or writing which authorized Mr. Turrell to endorse checks for the General Cigar Company; that there was no occasion to endorse any checks except when they were intended for deposit in the Bank when all that was used was a rubber stamp which anybody could affix to a check and take it to the bank and deposit it; that deposits in the First National Bank were generally made by the bookkeeper who would place rubber stamp endorsement on checks and take them to the Bank which credited the General Cigar Company's account. The stamp used was a printed rubber stamp reading "Pay to the order of First National Bank," signed: "General Cigar Company" which is the usual stamp that all businesses use in sending checks to bank. In the period of 24 years during which he had been connected with Plaintiff or its predecessor, he had never seen the stamp referred to used for the cashing of any checks and if cash was needed, a special check would be issued for that purpose. He

recalled no instance where a check from out of town from a customer or from one of the other branches of Plaintiff on an out of town bank was cashed. The Plaintiff's payroll was paid by check. In rare instances, small amounts were paid in cash but such amounts never ran over \$100 or \$200 at the very most. The bookkeeper, Mr. Beach, generally made deposits with Defendant, although at times Mr. Turrell took up the deposit himself or at times other parties. When statements were made up at the end of each month, by defendant, of plaintiff's accounts, Mr. Turrell would get these and there was no one over him to check such statements, except that yearly accounts were gone over, by accountants. The accountants went over the books of the Company in January, 1920, and January, 1921, but at said times reported no irregularities.

Mr. Louisson testified that he was never suspicious of Mr. Turrell in any way from the time that he became Cashier, or before that when he was bookkeeper, until after his employment with the Company terminated; that he did not recall any circumstances that caused him to be suspicious of Mr. Turrell during that time. The year 1920, the business of the Portland Branch of the General Cigar Company did show a leak which was believed to be a stock shortage, and Plaintiff went to a great deal of expense to audit the stock books but found nothing wrong. The same thing occurred again at the end of 1920, but no suspicion was directed at Mr. Turrell or any one else. Mr. Turrell appeared to assist in attempting to find the stock leakage. Mr.

Turrell's connection with the Plaintiff Company ceased on December 31, 1920. Towards the end of that year, his work had become unsatisfactory. He was careless and didn't show the enthusiasm which he should have shown and so it was decided to let him go the last of the year. Mr. Louisson asked him, however, to stay on until the latter part of January after the auditors had been there and audited the books, so that he could help them in different things which they wanted to know which Mr. Turrell did. Thereafter, the audit not revealing the trouble, and not being able to find any shortage in the stock, the Pinkerton Detective Agency was consulted and said Company found out that Mr. Turrell had made large deposits in the United States National Bank and investigated the report that Turrell had inherited money from his family and found such report false. Later, Plaintiff's San Francisco office sent the Portland office cancelled checks which it had discovered, made out payable to Cash, the corresponding stubs having been marked void or cancelled, and it appearing that similar amounts had been deposited to Turrell's account in the United States National Bank, it was then believed that Mr. Turrell had been guilty of embezzlement. The information that indicated Mr. Turrell to be guilty was found May 26th or May 27th, 1921. At that time, Plaintiff had no information as to any other checks which Mr. Turrell had used irregularly except those payable to "cash". Immediately warrant was procured for Mr. Turrell's arrest and he was arrested and simultaneously action was taken to attach

certain property of Mr. Turrell's. In a day or so Mr. Turrell offered to confess and such confession was made. In such confession, Mr. Turrell admitted to obtaining money not only on the checks which he had made out payable to "cash", but he also said that in addition to this he had taken out of town checks to the amount of \$10,00 or \$12,000 to the bank, endorsed them with the rubber stamp endorsement which stamp had been used by Plaintiff for the purpose of deposit at the bank, and had cashed these checks and obtained the money from the bank. Plaintiff's San Francisco office was immediately notified of Mr. Turrell's statements and how much he had obtained. The Bank deposit slips were not available and it was necessary to go to the Bank and get them to give duplicate deposit slips for the year past. The Auditors worked as fast as they could and it took about six weeks before a complete statement as to the amount of the checks that were intended for deposit, but had been cashed, was developed. It was necessary to obtain duplicate deposit slips because the original deposit slips had been lost in a fire occurring on December 3, 1920, in Plaintiff's place of business. The audit of the Portland deposit slips and of the Seattle and Spokane deposits was completed so that an accurate statement was had of exactly what checks had been cashed after the middle of July, probably a few days later than that.

It was stipulated by counsel that demand was made on Defendant by Plaintiff on July 20, 1921, for a payment or crediting to its account of the sums obtained by

Turrell on the checks concerned in the various causes of action involved in this cause.

It was further stipulated that Defendant denied liability without assigning any reason for the rejection.

Mr. Louisson identified the checks described in the various causes of action set forth in Plaintiff's Complaint and testified that they were the ones in regard to which Turrell confessed and said checks were received in evidence as Plaintiff's Exhibits 2 to 10 without objection; the seventh and eighth causes of action having been dismissed, the checks described therein were not introduced in evidence. The checks so introduced were as described in the allegations of said Complaint. Each check was endorsed on the reverse side by the rubber stamp endorsement set forth in words and figures in Plaintiff's Complaint and were endorsed also by the First National Bank in words and figures, as follows:

Pay to the order of

Any bank, banker or trust company,

All prior endorsements

guaranteed

A April 2, 1920 A

FIRST NATIONAL BANK

24-4 Portland, Oregon. 24-4

H. E. Dickson, Cashier.

Said checks had no other endorsements except certain of them bore the endorsement of the Seattle branch of the Federal Reserve System and also except that the checks declared on in Plaintiff's Sixth cause of action

bore the indorsement "N. W. Turrell". All of said checks were marked paid.

Mr. Louisson testified that checks of this sort were received at Portland in this manner: The branches of the General Cigar Company were in the habit of drawing on each other for merchandise when one branch happened to have more merchandise than it needed and another branch needed merchandise. The Seattle and Spokane branches were buying a good many cigars from the Portland branches, particularly imported cigars, for which Portland was the only port of entry. If the Spokane or Seattle branches needed merchandise and the Portland branch had an oversupply, the Portland branch would ship the merchandise to the other branches and the other branches would pay for such merchandise by checks such as the above when the month was over. Mr. Louisson testified that the defendant had not given Plaintiff credit for the amount of these checks in any of its accounts at the bank and that Defendant has not paid Plaintiff any part of the amounts thereof.

Upon Cross Examination Mr. Louisson testified that Mr. Turrell's duties as Cashier for the General Cigar Company comprised the opening of all the mail, the taking charge of all the cash, having charge of the office and charge of the books of the branch, including the private ledger, which had the accounts that had to do with the inter-organization of the branches of Plaintiff's business. He testified that Mr. Turrell at times took the bank deposits to Defendant Bank, but mostly the Bank deposit was taken by the bookkeeper, Mr. Beach, and that he took the checks to the Bank that he had made

out to cash. He testified that Turrell had authority to stamp one of the checks here concerned as it was stamped and take it to the bank and deposit it, also that he would have had authority, after making such deposit, to write a check for cash and to withdraw the amount thereof. Mr. Louisson testified that he learned of the fraud committed by taking these checks and cashing them instead of endorsing them from the confession of Mr. Turrell on May 27th or 28th, 1920, and that Plaintiff did not notify the Defendant until it had ascertained the facts and gotten the amount to notify them about, notice being first given on July 20, 1920. He testified that no one checked Mr. Turrell's work except the auditors in their annual audit; that Mr. Turrell was the only one that had to do with examining all returned bank statements and vouchers; that no one else examined said statements except at the annual audit. He testified that the first check wrongfully cashed by Turrell was in December, 1919; that the same was not discovered at the audit in January, 1920, the reason being that the discrepancy was not sufficient to attract attention, the fire destroying the records of Plaintiff's Portland branch occurring December 3, 1920. He testified that a check coming from a Spokane or Seattle branch of Plaintiff's business to the Portland branch would have been noted on the books of the Portland branch if the check had gone through the usual channel and Turrell had been honest; but that in regard to the checks concerned here, that Turrell made no entries of the charge or the check, the result being there was nothing on the books of the Portland

branch to show that the merchandise had been sent to Seattle and there was nothing on the books to show that Seattle had paid for the merchandise. If it had not been for Mr. Turrell's dishonesty, such entries would have appeared in the usual course of business. Mr. Louisson testified that in some instances when a check would come for merchandise, that had been sold one of the other branches, the check would be deposited but Turrell would immediately draw cash checks against it and wipe out the transaction; that Turrell had authority to draw checks on the Plaintiff's account and such checks were shown by return statements and vouchers from Defendant to Plaintiff; that such actions by Turrell were not discovered because Turrell examined the statements and vouchers. He testified that the embezzlements occurring in the latter described manner were not discovered upon the return of statements and vouchers, but that there was more chance of discovering embezzlements in this manner than the embezzlements by cashing out of town checks.

On redirect examination, Mr. Louisson testified that embezzlements accomplished by Turrell through drawing checks to cash and cashing them were first discovered and that embezzlement accomplished by cashing out of town checks were not discovered except through Mr. Turrell's confession. He testified, further, that when the drawee banks cashed the checks here concerned, that they were probably returned to the Spokane and Seattle branches as cancelled vouchers in regular course and that there was nothing on the checks to call the

attention of the Spokane & Seattle branches to any irregularity. He testified that in the regular course of business of the plaintiff's Portland branch, there was no occasion for the drawing of large checks to cash, and that prior to the discovery of these embezzlements he had not known of Turrell's having drawn any such checks.

On re-cross examination, Mr. Louisson testified that interchange of statements between the various branches were had regularly and that by such interchange the embezzlements of Turrell, accomplished by the cashing of the checks in question, would have been discovered if Turrell had not himself received and made out said statements and thereby prevented the discovery of the fraud. Using one of the checks drawn on the Seattle bank as an example, Mr. Louisson testified that when Turrell took it to the defendant bank and cashed it the defendant bank sent the check to the drawee bank at Seattle. The drawee bank charged the amount to the General Cigar Company's account and returned the cancelled check to the Seattle office of the General Cigar Company. This informed the Seattle branch of the General Cigar Company that the check had passed from its Portland branch to the defendant bank. Mr. Louisson further testified that there was an interchange of statements between the different branches of the General Cigar Company but that Turrell manipulated the statements going out from and coming in to the Portland office in such a way as to cover up the discrepancies, and Turrell kept off the books of the Portland office all records of merchandise

sent from the Portland branch to the Seattle and Spokane branches.

Mr. Louisson testified that it was manipulation by Turrell of the records and statements of the General Cigar Company that prevented the discovery of Turrell's practice of cashing the checks in question instead of depositing them.

On re-direct examination he testified that each of the branches were run as a separate and distinct unit, practically as different businesses, that the various branches reported to the San Francisco office which was the audit center, and that the books of each branch were audited annually the first of each year.

L. M. BEACH, Witness for Plaintiff.

Mr. L. M. Beach was called by plaintiff and testified that in 1920 he was Assistant Cashier and stock man of the Portland Branch of the General Cigar Company, that in that position he generally attended to the making of deposits. That Turrell opened the mail containing checks and gave him, Beach, the entries to be made and checks to be deposited; that he, Beach, usually affixed the rubber stamp to the checks which were to be deposited, but sometimes this was done by the bookkeeper or stenographer or whoever happened not to be busy at the time. Mr. Beach testified that he was present when the special accountants did their work in January, 1921, and that when an effort was made to find returned checks and statements at that time, Turrell made the explanation that they were burned in the fire. On Cross-Examination Mr. Beach testified that at times Mr. Tur-

rell used the rubber stamp for endorsement and at times made deposits in the Defendant bank.

H. T. SHORT, Witness for Plaintiff.

Mr. H. T. Short was called as a witness by Plaintiff and testified that he held the office of Comptroller in Plaintiff corporation and had had extensive accounting experience and was acquainted with the practice with regard to endorsements. He testified the usual procedure of endorsement for deposit was to make endorsement with a rubber stamp endorsement, payable to the order of the Bank and check is naturally passed to the credit of the concern who is depositing it, that the rubber stamp is placed upon a check by almost any one in the office, often the office boy; that the endorsement is used for the protection of the depositor company, the check so endorsed will be placed to the credit of the endorser, not cashed.

NEIL W. TURRELL, Witness for Plaintiff.

Mr. Neil W. Turrell was called as a witness by Plaintiff. He testified that he acted from July 1, 1919, to January 1, 1921, as Cashier of the General Cigar Company, that he handled the monthly statements from the Defendant bank during that time, that the regular practice in regard to checks coming from out of town branches was to affix the regulation rubber stamp on the reverse of the check and deposit same; that his irregular practice was to so endorse said checks and cash same at defendant bank, that in cashing them he was not required to sign as Cashier when he cashed them, but on one occasion was required to sign his own name,

underneath the rubber stamp endorsement. The checks that he cashed in this manner represented, he testified, payment from other branches of Plaintiff Company; that the books did not show the irregularity because he took care of that in sending statements to the other branches and that he did not put the charge for the merchandise which the checks paid for on the books of the General Cigar Company at Portland, the result being that the transaction did not show on the books. He testified to a conversation subsequent to his arrest with Mr. Arthur Jones, Vice-President of Defendant Bank, in which Mr. Turrell stated that Jones said to him "that he thought it was very—, a peculiar thing that they had cashed these checks because they had all been expressly ordered not to do that sort of thing."

On cross examination, Mr. Turrell testified that he was pretty well known at the bank and that he was known at the defendant bank as the cashier of plaintiff company; that the only dealings he had with defendant constituted taking up deposits, getting drafts and drawing checks; that he did not re-deposit any of the moneys he obtained from these checks to the account of the First National Bank.

On re-direct examination, he testified that he never had any dealings with the defendant in the way of borrowing money or signing notes or other executive dealings with them.

W. L. THOMPSON, Witness for Defendant.

The plaintiff rested and W. L. Thompson was called as witness in behalf of defendant. He testified that he was Vice-President of First National Bank and Chair-

man of the Committee on Rules and Regulations of the Portland Clearing House; that there was no rule of the Portland Clearing House to the effect that an endorsement such as the endorsements made on the checks here involved should be used for deposit only, and that such endorsement was frequently used in payroll checks, that is, checks are endorsed payable to endorser and with rubber stamp endorsement and the cashier, or whoever represents the customer, presents it at the windows and gets the cash on it; that many firms use the particular stamp as an indorsement for deposit but most of them use a restrictive endorsement "For Deposit Only."

On Cross Examination, Mr. Thompson testified that it was unnecessary to make an inquiry as to the authority of the person presenting a check so endorsed for deposit when deposited, as in that case the check would go to the credit of the endorser and that it was immaterial whether the stamp was affixed by bookkeeper, president, cashier or stenographer for that matter, but that the check would be cashed only for the authorized representative of the account with the bank; that the never knew of the General Cigar Company's having any payroll check.

A. O. JONES, Witness for Defendant.

Mr. A. O. Jones was called as a witness on behalf of the defendant and testified that he was Vice-President of defendant company and denied that he made a statement to Mr. Turrell that Tellers had been instructed not to cash checks such as the ones here concerned.

EXCEPTION NO. 1

On Cross Examination Mr. Jones was asked:

“Mr. Jones, are you sure you did not make the statement to him that that was something which was done absolutely against the instructions and orders of the bank?

A. I positively did not say anything about it, Mr. Nelson, I had just one purpose in having Mr. Turrell come down to the bank. I called him from his home.

Q. Do you remember making that statement to Mr. Louisson?

A. About what?

Q. That this practice was absolutely contrary to the orders and instructions of the bank?

A. Not that I remember of, no.

Q. You don't remember telling Mr. Louisson?

A. No, sir.

Q. That it was the bank's fault?

A. No, sir, I did not.

Q. And that the bank ought to make this good?

A. I did not. I certainly would not.

Q. You know Mr. Louisson, don't you?

A. Well, I should say so.

Q. Do you remember talking to him on two different occasions?

Mr. Gearin: Did Louisson testify to that?

Mr. Nelson: No, Louisson didn't testify to that, but he will testify to it.

Q. Do you remember talking to him on two dif-

ferent occasions, Mr. Jones, at the bank and telling him that this was something which absolutely should never have been done, that the bank was at fault, and ought to pay it?

A. I did not.

Q. You did not?

A. No, sir.

Excused.

Mr. Freed: We rest, your Honor.

JULIUS LOUISSON Recalled in rebuttal for plaintiff.

DIRECT EXAMINATION

Mr. Gearin: If you are going into that question, I object to the question. It was not proper cross-examination. It was immaterial matter, and they cannot call a witness now to contradict that one.

Mr. Nelson: No objection on the ground it was not proper cross-examination, your Honor, and it is an admission against interest, developed from a witness for the defendant in trying to refresh his recollection whether he had not made this statement to Turrell, whether he had not made similar statements to others. I have the right to ask the question to show conflicting statements.

Mr. Gearin: This is not rebuttal.

Mr. Nelson: This is your witness.

COURT: I will overrule the objection.

Questions by Mr. Nelson: Mr. Louisson, are you acquainted with Mr. Arthur Jones, Vice-President of

the First National Bank?

A. Yes, sir, I know him very well.

Q. The Gentleman who was just on the stand?

A. Yes, sir.

Q. I wish you would just answer this question Yes or No, if you will. Will you state whether or not, on either one or two occasions, you had a discussion with Mr. Arthur O. Jones, Vice-President of the First National Bank, with reference to these checks, in the course of which he made the statement that they were cashed absolutely against the rules and practices of the bank and that the bank was at fault, and should pay it without a fight?

Mr. Gearin: Objected to.

COURT: That is not exactly what was stated. It seems to me you will have to have the reporter read what was stated.

Q. Will you please consider I am incorporating in this question now just the language I used in asking questions to Mr. Jones? Now state whether or not Mr. Jones, on either one or two occasions, ever made the statement to you that the cashing of these checks was not in conformity to the practices, and against the orders of the bank, and that the bank was at fault, and ought to pay?

Mr. Gearin: I object to that, if the court please, as incompetent and immaterial, and not rebuttal. It was drawn out by themselves, and they cannot build up a man of straw here to tear him down again.

COURT: It was asked for the purpose of im-

peachment?

Mr. Nelson: Yes.

COURT: And that question was put to the witness Mr. Jones. It was asked for the purpose of impeachment. I think it is relevant and competent. I will overrule the objection.

Mr. Gearin: Save an exception.

Q. Answer the question Yes or No.

A. The words were not exactly the same, but it meant the same.

COURT: That is as far as you can go.

A. Not the same words.

Q. Will you state whether the substance was what was given you?

COURT: I think that is as far as you can go.

Mr. Gearin: You cannot impeach on substance.

Mr. Nelson: Will your Honor permit me to call Mr. Jones for one question? I did not know the exact words. I would like to know whether he said the substance of that to Mr. Louisson.

COURT: I suppose you might probably put the substance.

Mr. Nelson: Just that one question.

Excused.

A. O. JONES Recalled for further cross-examination.

Questions by Mr. Nelson:

Mr. Jones, will you state whether or not you said the substance of what I said to you to Mr. Louisson?

A. I had many conversations with Mr. Louisson on the subject. I told Mr. Louisson in many conversations we had about this matter that I was very, very sorry it happened, but I never told him the bank was liable in any way for paying these checks.

Q. You didn't either state the words which I used, or the substance of it, which amounts to this: That the practice was an irregular one and against the bank's instructions, and that the bank was at fault, and should pay the matter without suit? Did you state the substance of that to him?

A. We do a lot of little irregular things, seemingly, for the convenience of the customers, oftentimes, and I never told Mr. Louisson that the bank was responsible for this shortage.

Q. Did you say to him any part of what I have said to you?

COURT: I think that is going too far.

A. I told him I regretted the whole thing. I said "I am very sorry it has happened."

Q. You said the bank does irregular things, but you deny making any statement in substance of what I have said, to him?

A. I don't quite understand you, Mr. Nelson.

COURT: Those things must be specific, and when you speak of the substance of a thing, it must be very, very like, and you cannot go beyond that.

Mr. Nelson: My meaning, your Honor, is this, if I may reframe that:

Q. You understand, Mr. Jones, I am not attempt-

ing to give a stenographic report of a conversation.

A. Yes, I know.

Q. BUT did you say that, or did you say something which had the general purport of that?

A. The only thing I ever told Mr. Louisson was I was sorry the whole thing had happened; I regretted it.

Q. Mr. Jones, I will ask you this question: Did you say this or words in substance like these: "I don't see why the bank is contesting this matter. They are liable for it, and ought to pay it"?

A. No.

Q. You don't recall saying that?

A. I do not.

Mr. Gearin: I certainly object to this system of undertaking to impeach a witness. The rule is very strict upon it. They must give the time, place and persons present, and the substance of the identical conversation they are impeaching on. He is undertaking to lay a foundation for three different conversations.

COURT: I think this matter is too indefinite.

Q. Let me ask this: You remember conversing with Mr. Louisson in the First National Bank, Mr. Jones, do you not, on this subject?

A. Dozens of times, yes.

Q. On this particular subject?

A. Yes.

Q. And you don't remember these words, to this effect, being used in any of those conversations?

A. No, I don't.

Q. It would not do any good to tell you any particular date?

A. No, I don't. I really don't. If I did, I would tell you, but I don't.

Mr. Nelson: Now, I would like to recall Mr. Louis-son.

COURT: I will sustain the objection to that. You did not fix any time, place or persons present, or the exact matter that was spoken.

Mr. Nelson: If the court please, I would like to make an offer of proof in that regard, if I may.

COURT: You may make your offer of proof. You already have it in the record, the whole thing.

Mr. Nelson: That is understood, then. The proof I offer is that he did make those statements.

COURT: Very well.

Mr. Nelson: We may have an exception to the exclusion of that?

COURT: Yes, you may have your exception.

Mr. Nelson: We rest, your Honor."

* * * *

The parties having rested and arguments having been made to the Jury, the court instructed the Jury as follows:

Instructions.

"Gentlemen of the Jury:

Plaintiff has entered suit against the defendant to

recover on 11 counts or causes of action, two of which have been stricken from the complaint, namely, counts 7 and 8, one for \$29.75 and the other for \$29.43, leaving for consideration but nine counts, eliminating the 7th and 8th which will have nothing to do.

I will state the essential allegations of the first count or cause of action, only, as it is similar to all the rest, in order to give you the basis upon which the complaint is predicated.

On December 13, 1919, plaintiff, at Spokane, Washington, through its agents, engaged in conducting plaintiff's branch business in that city, drew its check on the Spokane & Eastern Trust Company, payable to itself, in amount \$1,293.58. The check was transmitted in the usual course to plaintiff's Portland branch, and was received by plaintiff's agent conducting its business in Portland, and was there indorsed for deposit as follows:

"Pay to the order of
First National Bank
335 Portland, Ore. 335
General Cigar Co. Inc.
M. A. Gunst Branch
M. A. Gunst & Co."

In this relation it is alleged that said special indorsement was one uniformly used by plaintiff for the purpose of deposit with defendant bank, and was in the form prescribed by it and by the Portland Clearing House Association, of which the defendant bank was a member, to be used for the purpose of deposit.

It is thereupon further alleged that N. W. Turrell, wrongfully and without authority from the plaintiff, converted the check to his own use, and transferred it to the defendant, and on or about December 18, 1919, defendant presented it to the bank on which it was drawn, which paid it to defendant and charged the amount to plaintiff, and defendant has never credited plaintiff therewith. By reason of these alleged facts, it is insisted that defendant received to its own use and benefit the money thus paid to it by the Spokane bank, and plaintiff demands payment therefor.

Some of the checks mentioned in the several causes of action were drawn by the Seattle branch upon a Seattle bank, but all of them took the same course, were indorsed in the same manner (save one), and were paid and charged in the same way. The one exception contained the name N. W. Turrell written underneath the indorsement. This variation in the indorsement does not in legal effect differentiate it from the rest.

The defendant, for answer, alleges that, prior to July 23, 1919, and since, plaintiff had, and has, three separate accounts with defendant, subject to be checked out or otherwise withdrawn by plaintiff or its duly authorized agent; that on the day last named plaintiff, in writing, authorized Julius Louisson and N. W. Turrell, or either of them, to demand and receive from defendant, and defendant to pay to these parties, or either of them, any moneys which plaintiff had in defendant's bank under any of such accounts; that Turrell was henceforth the agent of plaintiff, fully authorized to demand

and receive from defendant all the moneys in its bank standing in plaintiff's name; that Turrell, on behalf of and as the act of plaintiff, indorsed the check in manner as alleged in the complaint, which it is alleged was the customary form used by Turrell and plaintiff in indorsing checks, either for payment or deposit, and that Turrell was fully authorized by plaintiff so to indorse it; that Turrell, acting as plaintiff's agent, presented the check so indorsed to defendant, and requested defendant to pay it to him for plaintiff and to transmit it (the check) to the Spokane Trust Company, where it would be taken up and paid by that company and the amount charged to plaintiff's account; whereupon defendant paid to Turrell, as agent of plaintiff, the amount of the check; that by reason of the authorization mentioned Turrell had full authority from plaintiff to indorse the check in manner set out, and to collect and receive the money from defendant.

For a second answer, defendant sets out that Turrell had been in the habit of indorsing checks in the manner pointed out, and defendant, because of the authority vested in him by plaintiff, cashed such checks when so presented, and paid the money to Turrell for plaintiff, and the checks were thereupon paid to defendant by the drawee banks, and charged to plaintiff's account; that a proper audit or check of its books and business at Portland and Spokane and the accounts of Turrell would have disclosed to plaintiff the practice of Turrell; that during all the times mentioned there were monthly statements rendered and settlements made between

plaintiff and defendant, and between plaintiff and the Spokane bank, and at such settlements plaintiff's cancelled checks and itemized statements of plaintiff's accounts with the respective banks were returned to it by defendant and the Spokane bank, and an account stated was had between plaintiff and each of such banks; that plaintiff at no time prior to January 1, 1921, made objection to such payments by defendant, or claimed that Turrell was without authority to receive the money on the checks, and that plaintiff by its silence has ratified and confirmed the acts of Turrell in so indorsing and receipting the money upon such checks, and is now estopped to deny that Turrell had authority so to receive payment.

For a third answer, it is alleged that plaintiff learned of the fraud of Turrell long prior to July 20, 1921, but did not notify defendant thereof until that date; that because of such failure to notify defendant promptly of the fraud, defendant has been deprived of the opportunity to proceed against Turrell and thereby to obtain from him restitution for the wrong suffered until it was too late to recover anything.

The fourth answer is not for your consideration, but is for the court only. It is not essential, therefore, that you give it any attention.

The real issues presented for your consideration are few. On July 23, 1919, defendant was advised that "the signatures of Julius Louisson and N. W. Turrell (that is, either of them) are authorized to sign checks drawn on the following accounts:" There were three

of them, and they are named in the authorization. This authorization contained the signatures "Julius Louisson, Manager; N. W. Turrell, Cashier."

Nothing is said about the indorsement of checks and the form which it was to take. You will note that the crucial controversy here is touching Turrell's authorization by plaintiff to demand and receive payment of the checks from defendant. The defendant was unauthorized to pay out money on plaintiff's account to Turrell, unless Turrell was duly empowered by plaintiff, as its agent, to demand and receive the same.

That Turrell was agent for plaintiff in drawing checks against plaintiff's account with defendant is not questioned. But did the scope of his agency extend to demanding the cash upon checks indorsed in the manner these in suit were? The manner of indorsement seems to be one common in banking circles. Under the testimony, there seems to be two opinions respecting the custom of banks in acceding to the demands of an agent for payment in pursuance of such an indorsement. One affirms that it is usually done, and the other denies. The effect of the indorsement is that the bank pay to itself the amount of the check, so that the indorsement gives no authority for payment to the agent, or one presenting the check to the bank. Turrell's authority to demand payment must be deduced, if at all from the specific authority extended to him as cashier to draw checks, or the general authority arising from the exercise of the ordinary duties attending the office of cashier. The sheer authority to draw checks can scarcely authorize

a demand and receipt of funds on an indorsement directing payment to the order of the bank. It will be necessary to look further than that authorization alone, although it will be pertinent to take into account such authority, along with other matters which you will consider, in order to determine the real scope of Turrell's agency. The fact that Turrell was cashier for plaintiff counts for something, and you may inquire under the evidence, to what extent the duties of the office as cashier authorized Turrell to act, and whether it comprised the authority to demand and receive payment on checks indorsed as these were.

In this relation, you will take into account the custom of banks in Portland, first ascertaining from the evidence what it is, as it respects paying money to agents upon indorsements in that form. So it is you must ascertain and determine the scope of Turrell's authority as plaintiff's agent to demand and receive the money from defendant bank on checks so indorsed, as these were, from all the testimony adduced bearing upon the subject, and say whether he possessed such authority or not. If he did possess such authority, that ends this case, and your verdict should be for the defendant. If, however, you say that he did not, then you will consider other matters which I will explain to you. In this relation, I give you this further instruction:

If one holds out to the world and accredits a person as his agent, he is bound by that person's acts done within the scope of the agency thus given him. In such cases, the question is, not what authority was intended to be

given to the agent, but what authority was the third person dealing with him justified from the acts of the principal in believing was given to him.

I will repeat it in somewhat different language:

When one holds another out to the world as his agent, in determining the liability of the principal, the question is, not what authority was intended to be given to

So you may consider and determine what, if anything, plaintiff has done in holding out to all persons and accrediting Turrell as its agent, and the scope of the agency, and say whether the defendant was justified therefrom in dealing with Turrell as it did, believing he was thus authorized by plaintiff to draw the funds.

It is a general principle that that party should bear the loss whose conduct makes the loss possible. If you believe from the evidence that Turrell did not have actual authority to receive the money on the checks described in the pleadings for the General Cigar Company, but that the General Cigar Company by the exercise of reasonable care in the conduct of its business should have discovered Turrell's practice in cashing its checks at the defendant bank, and if you believe that the General Cigar Company did not prior to January 1, 1921, make claims to the defendant bank that Turrell had no such authority, you must find for the defendant bank on all the causes of action involving the checks after the time when the General Cigar Company should have discovered Turrell's said practice.

This disposes of the first further and separate answer.

As it respects the second answer, it is a rule of law that a depositor must examine the bank's periodical statements and report to the bank without any unreasonable delay any errors he may discover, or the bank may regard his silence as an admission that the entries as shown are correct.

It is alleged, among other things, that at all times from July 23, 1919, to December 15th of the same year, the plaintiff, in addition to the three accounts carried in the defendant bank, carried accounts in the Spokane & Eastern Trust Company, of Spokane, and the Union National Bank, of Seattle, and that each of these banks, including the defendant bank, rendered a monthly statement to plaintiff of its account therewith; that thereby the plaintiff was advised as to the exact condition of its accounts in each of these banks, respectively, touching the amounts of money drawn from the bank by Turrell, but made no objection thereto, and gave the bank no information touching any irregularity affecting such accounts.

If you find from the evidence in the case that such were the facts, and that the plaintiff was so advised and filed, within a reasonable time, to advise the defendant bank of such irregularities, then the plaintiff would be estopped now to assert that defendant was liable for its acts in paying the money over to Turrell in pursuance of his request or demand, and your verdict should be for the defendant.

And in this relation, I further instruct you that a depositor who has permitted his agent to verify the

bank's statements is charged with notice of the fraud which would be disclosed by the examination of such statements, though not with the agent's knowledge of the fraud which he may have acquired otherwise than through such statements.

If you believe from the evidence a reasonably careful examination of the monthly statements rendered and cancelled vouchers returned to the plaintiff General Cigar Company, by the defendant, First National Bank, and the Spokane and Eastern Trust Company, would have disclosed to the General Cigar Company the fact that the checks involved in the first, fourth, fifth and ninth causes of action had not been credited to the General Cigar Company's account with the First National Bank and if you also believe that prior to July 20, 1921, the General Cigar Company made no objections concerning plaintiff's account with defendant or the cashing of these checks, you must find for the defendant on the first, fourth, fifth and ninth causes of action.

If you believe from the evidence that a reasonably careful examination of the monthly statements rendered and cancelled vouchers returned to the plaintiff by the First National Bank and the Union National Bank would have disclosed to the General Cigar Company the fact that the checks involved in the second, third, sixth, tenth and eleventh causes of action had not been credited to the General Cigar Company's account with the First National Bank, and if you also believe that prior to July 20, 1921, the General Cigar Company made no objections concerning plaintiff's account with defend-

ant or the cashing of these checks, you must find for the defendant on the second, third, sixth, tenth and eleventh causes of action.

I instruct you that, in order for a person to be called upon to object to a wrongful or unauthorized course of practice it is necessary that he know the facts and know the practice, or that a reasonably prudent person or concern under similar circumstances would have had such knowledge in an ordinarily intelligent conduct of his or its affairs. The question therefore becomes one of fact for you to determine, and the burden of proof in this regard is also upon the defendant, First National Bank, to show that the General Cigar Company, by giving in the matter of the Seattle and Spokane checks the attention and care which a reasonably prudent person under similar circumstances would have given them, would have discovered sooner than the General Cigar Company did discover, the method in which cash was withdrawn from the defendant bank on said out of town checks. The test in this regard is not what would have been discovered by the highest conceivable degree of care or by the investigation of a person abnormally suspicious, but only the care which an ordinarily prudent person or concern may reasonably be held to be bound to devote to its business and affairs under similar circumstances.

As it appertains to the third further and separate answer, I instruct you that, if you believe from the evidence that plaintiff learned on or about May 28, 1921, of Turrell's fraud in connection with the moneys re-

ceived from defendant bank on the checks involved here, and you further believe that plaintiff did not promptly notify the defendant that plaintiff would hold it responsible for such moneys paid to Turrell, then you will find for the defendant. Prompt notification would be such as a prudent man would exercise within a reasonable time, so as to advise of the situation.

Now, gentlemen of the jury, I instruct you further that the burden of proof lies with the plaintiff to show that the defendant bank paid out money without authority from the plaintiff, either real or apparent.

Defendant has the burden of proof of showing that plaintiff was advised by statements of account of Turrell's fraud and failed to notify defendant of its knowledge within a reasonable time.

The burden of proof, gentlemen, is simply the weight of the testimony. It is such weight as would carry the scales of justice down upon one side or the other; and in considering the question as to whether these parties have made out their case by the burden of proof, as I have mentioned to you you will determine whether the weight of testimony is upon that side.

The Jury are the judges of the effect of the evidence. The court gives you the law, and you take that from the court and apply it implicitly, but when it comes to determining what the testimony proves, that is within your function, and not within the function of the court.

A witness is presumed to speak the truth, but that presumption may be overcome by the character of the testimony and by the manner in which the testimony

is given, or by testimony affecting the character or the motives. A person found to be false in one particular is to be distrusted in all.

So you may take into consideration the interest that a witness may have in the outcome of the suit in hand, and also any other evidence that may seem to affect his credibility. And in this way you will determine the credibility of the witnesses, and when you have determined that, you will be the better enabled to say what your verdict shall be in the end.

I will say to you, further, that in considering this case you will take into consideration all the testimony in the case bearing upon the particular subject which you may have under consideration. You will consider all the testimony, whether adduced by the plaintiff or the defendant, and compare the different parts thereof one with another, so that you may be able to say, from the entire record, where your verdict should lie and what it should be.

If you find for the plaintiff, gentlemen, you will find the several amounts which are mentioned in the prayer of the complaint, with interest due as there demanded, save and except you will not find the amounts which are named in the seventh and eighth causes of action. You will readily understand the prayer as it affects those two counts.

If you find for the defendant, of course, your verdict will simply be for the defendant.

EXCEPTION NO. 2

An exception was saved by Plaintiff to that part of the charge to the effect that if the jury believed from the evidence that Turrell did not have authority to cash the checks, but if they further believed from the evidence the General Cigar Company should have detected the fraud by reasonable diligence, then the jury must find for the defendant in regard to those checks which were cashed if the General Cigar Company should have caught the practices of Turrell.

The part of the charge to which this exception has particular reference is as follows:

“It is a general principle that that party should bear the loss whose conduct makes the loss possible. If you believe from the evidence that Turrell did not have actual authority to receive the money on the checks described in the pleadings for the General Cigar Company but that the General Cigar Company by the exercise of reasonable care in the conduct of its business should have discovered Turrell’s practice in cashing its checks at the defendant bank, and if you believe that the General Cigar Company did not prior to January 1, 1921, make claims to the defendant bank that Turrell had no such authority, you must find for the defendant bank on all the causes of action involving the checks cashed after the time when the General Cigar Company should have discovered Turrell’s said practice.”

EXCEPTION NO. 3.

Plaintiff saved an exception to that part of the charge that if the Plaintiff should have detected the fraud by an examination of the vouchers returned from the First National Bank, it would be precluded from recovery on the ground that there is no evidence to justify any such finding by the jury. Reference is made to Exception No. 5, *Infra* and to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 4.

Plaintiff saved an exception to that part of the charge which is to the effect that if the jury should find that by return of the vouchers to the Spokane branch from the Spokane bank with reasonable diligence they should have discovered that the fraud existed and did not discover it, they would be estopped from asserting a claim against the defendant, as far as checks drawn upon the Spokane bank are concerned. Reference is made to Exception No. 5 *Infra* and to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 5.

Plaintiff saved an exception to a similar instruction with respect to vouchers from the Seattle bank with regard to the checks which were drawn on the Seattle bank.

The ground for the last two exceptions were stated to be that there were no facts in the case to justify such a finding by the jury of lack of diligence in that regard,

and also on the further ground that the delay could not have injured the defendant in regard to a past transaction, namely the past fraud.

The parts of the instruction to which these exceptions that is, the third, fourth and fifth exceptions, particularly refer, are as follows:

“As it respects the second answer, it is a rule of law that a depositor must examine the bank’s periodical statements and reports to the bank without any unreasonable delay any errors he may discover, or the bank may regard his silence as an admission that the entries as shown are correct.

“It is alleged, among other things, that at all times from July 23, 1919, to December 15th, of the same year, the plaintiff, in addition to the three accounts carried in the defendant bank, carried accounts in the Spokane and Eastern Trust Company, of Spokane, and the Union National Bank, of Seattle, and that each of these banks, including the defendant bank, rendered a monthly statement to plaintiff of its account therewith; that thereby the plaintiff was advised as to the exact condition of its account in each of these banks, respectively, touching the amounts of money drawn from the bank by Turrell, but made no objection thereto, and gave the bank no information touching any irregularity affecting such accounts.

“If you find from the evidence in the case that such were the facts, and that the plaintiff was so advised and failed, within a reasonable time, to ad-

wise the defendant bank of such irregularities, then the plaintiff would be estopped now to assert that defendant was liable for its acts in paying the money over to Turrell in pursuance of his request or demand, and your verdict should be for the defendant.

“And in this relation, I further instruct you that a depositor who has permitted his agent to verify the bank’s statements is charged with notice of the fraud which would be disclosed by the examination of such statements, though not with the agent’s knowledge of the fraud which he may have acquired otherwise than through such statements.

“If you believe from the evidence a reasonably careful examination of the monthly statements rendered and cancelled vouchers returned to the plaintiff General Cigar Company by the defendant First National Bank and the Spokane and Eastern Trust Company, would have disclosed to the General Cigar Company the fact that the checks involved in the first, fourth, fifth and ninth causes of action had not been credited to the General Cigar Company’s account with the First National Bank and if you also believe that prior to July 20, 1921, the General Cigar Company made no objections concerning plaintiff’s account with defendant or the cashing of these checks, you must find for the defendant on the first, fourth, fifth and ninth causes of action.

“If you believe from the evidence that a rea-

sonably careful examination of the monthly statements rendered and cancelled vouchers returned to the plaintiff by the First National Bank and the Union National Bank would have disclosed to the General Cigar Company the fact that the checks involved in the second, third, sixth, tenth and eleventh causes of action had not been credited to the General Cigar Company's account with the First National Bank, and if you also believe that prior to July 20, 1921, the General Cigar Company made no objections concerning plaintiff's account with defendant or the cashing of these checks, you must find for the defendant on the second, third, sixth, tenth and eleventh causes of action."

Reference is made to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 6.

Plaintiff also saved an exception to that part of the instruction which said that the burden of proof was on the Plaintiff to show that money had been paid by the Defendant without authority to the Plaintiff's agent on the ground that the burden should be on the Defendant to establish payment to the person authorized.

The parts of the Instructions to which this objection has particular reference are as follows:

"Now, gentlemen of the jury, I instruct you further that the burden of proof lies with the plaintiff to show that the defendant bank paid out money

without authority from the plaintiff, either real or apparent.

“The burden of proof, gentlemen, is simply the weight of the testimony. It is such weight as would carry the scales of justice down upon one side or the other; and in considering the question as to whether these parties have made out their case by the burden of proof, as I have mentioned to you, you will determine whether the weight of testimony is upon that side.”

Reference is made to the Digest of Testimony hereinafter set out.

EXCEPTION NO. 7.

Exception was allowed for refusal to give Plaintiff's duly requested instruction, as follows:

“This is an action instituted by General Cigar Company, Inc., a corporation, against First National Bank of Portland, Oregon, a National Banking corporation. It is admitted that both the Plaintiff and Defendant are incorporated as alleged.

“There are several causes of action in the Plaintiff's Complaint and inasmuch as the Answer to each and the Reply to the Answer involve precisely the same issues, I will simply take the first of these and you will understand that what I have to say as to the first applies with equal force to each of the others.

“The General Cigar Company conducted a wholesale and retail cigar and tobacco business in

the City of Portland, Oregon, and the same corporation had a branch at Spokane, Washington, engaged in a similar line of business. The Spokane branch being indebted to the Portland branch for merchandise, issued its check payable to the General Cigar Company, Portland, Oregon, in the sum of \$1293.58. This check was drawn on the Spokane and Eastern Trust Co., a banking corporation of Spokane, Washington. The check was received at the Portland office and there was endorsed upon the check by rubber endorsement the following:

“ ‘Pay to the order of First National Bank

335 Portland, Oregon 335

General Cigar Co., Inc.

M. A. Gunst Branch

M. A. Gunst & Co.’ ”

“I instruct you that the effect of affixing such a stamp to the back of a check is to make the check payable to a special banking corporation, namely the First National Bank, of Portland, Oregon, and is a method of endorsement commonly utilized for purposes of deposit, and had been so utilized throughout the dealings of the General Cigar Company with the First National Bank.

“It further appears that one Neil W. Turrell, Cashier of the General Cigar Co., had by virtue of a letter or power of attorney from the General Cigar Co., lodged with the First National Bank in July, 1919, been specifically authorized to sign checks on the funds of the General Cigar Co. or deposit

with the First National Bank. Turrell took the Spokane check which I have described to you, endorsed as I have said, to the Defendant First National Bank, and the Defendant First National Bank, to which the check was made payable by endorsement, paid the face amount thereof in cash to the said Turrell, and then in turn collected the amount of the check from the Bank on which it was drawn, that is, the Spokane and Eastern Trust Company at Spokane. It is admitted that the Bank did not credit the amount of the check to the General Cigar Company's account at Portland, Oregon, and that unless the Bank had authority to pay the cash to Turrell and unless the payment to Turrell was in law and in fact a payment to the General Cigar Company, or unless you should find the bank is released from liability because of other matters to which I shall hereafter advert, the General Cigar Company has not been paid and the First National Bank is indebted to it in the amount of the check. Whether or not such liability exists is the question for you in this case, and it becomes necessary for me to explain to you how an agency is created, what authority an agent ordinarily has, and what are the respective rights and duties of the depositor and of the Bank."

Reference is made to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 8.

Exception was taken and allowed for failure to give Plaintiff's duly requested instruction, as follows:

"I instruct you that when a negotiable instrument, such as the check in the case at bar, is endorsed specifically to a banking corporation, that the party having physical possession of such a check has not from the possession of such check alone, any authority to negotiate the same or receive the proceeds thereof."

Reference is made to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 9.

Exception was taken and allowed for failure to give Plaintiff's duly requested instruction, as follows:

"I instruct you that an agent has the authority which is actually formally and expressly conferred upon him and the power necessary to carry his instructions into effect, and also such powers as he is held out by the principal to the world and to those dealing with him as having. The principal has a right to limit and define this authority and when he does so limit it, the agency for those particular purposes, at least, becomes a special agency, and all persons must have regard to the limitations imposed, and if they deal with the agent on such a special field of agency in any other way than the way prescribed by the principal, the principal is not ordinarily bound. In this case it is not disputed that there was conferred upon the agent, Tur-

rell, by a letter or power of attorney, certain specific authority with reference to checks, i. e., the authority to sign checks on certain designated accounts and to sign these checks in a certain designated way, that is, as Cashier. That thereupon it became the bank's duty to the principal, the General Cigar Company, to decline to cash any checks on the funds of the depositor save and except those executed in the manner specified in the power of attorney, unless it has been shown to you that other or broader authority was conferred in some effective manner."

Reference is made to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 10.

Exception was taken and allowed for failure to give Plaintiff's duly requested instruction, as follows:

"I instruct you that the letter or power of attorney was silent on the subject of endorsements; that the rubber stamp endorsement making a check received by a depositor on an out of town bank payable to the order of the local bank in which he deposits, is one not required to be affixed by the principal himself or by any one holding any special powers and passes title to the fund to the depository bank alone. When the check is so stamped and is deposited with the bank to which it is made payable, by the rubber stamp endorsement, it is placed to the credit of the depositor and no question ordinarily arises as to the individual or the authority

of the individual affixing the rubber stamp.”

Reference is made to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 11.

Exception was taken and allowed for failure to give Plaintiff's duly requested instruction as follows:

“In this case it is claimed by the Defendant bank that the rubber stamp which I have described was used for another purpose than that of deposit, that is, that it was used for the purpose of obtaining cash over the counter and that Turrell, to whom I have referred, had authority from the Plaintiff, General Cigar Co., to obtain through the use of said rubber stamp endorsement, cash from the Defendant bank on checks received by the General Cigar Co. drawn on out of town banking institutions. I instruct you that the burden of proof is on the defendant First National Bank, to show that Turrell had the authority which the bank claims. There is no presumption of such authority. Neither the letter of July, 1919, authorizing Turrell to sign checks, nor the fact that he or other employees could stamp out of town checks payable to the order of the First National Bank creates of itself any authority on Turrell to obtain cash on such facts and it is incumbent upon the Defendant, First National Bank, seeking to justify payment of cash to Turrell thereon, to prove to you by a preponderance of evidence that Turrell had such authority.

“In considering the question of whether or not such authority existed, you are not only entitled, but it is your duty to consider all the facts in testimony and the circumstances surrounding the parties and attending the transactions and to determine from such a consideration whether or not the bank has established Turrell’s authority to cash said checks and the Bank’s right to pay them instead of placing them to the credit of its depositor, General Cigar Company. The Bank can justify itself and prevent a recovery of this case only by proving that the money was placed to the credit of the General Cigar Company or was otherwise used for the benefit of the General Cigar Company, and, it being admitted that it was not credited to the General Cigar Company but was paid to Turrell, the Bank must show that when it made a payment to Turrell it was under Turrell’s authority paying the money to the General Cigar Company.”

Reference is made to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 12.

Exception was taken and allowed for failure to give Plaintiff’s duly requested instruction, as follows:

“I instruct you that the letter or power of attorney of July, 1919, clearly required the signature for the General Cigar Co. of two persons, Julius Louisson, the manager, or Neil W. Turrell, cashier, and that meant their signature in a representative

capacity, as manager or cashier respectively, and not merely as individuals. There has been no testimony to show any authority to the Bank or any practice or course of dealing between the parties which would justify the bank in paying out cash on a rubber stamp signature without the personal signature of either the manager or cashier as such, unless it can be said that the payment of the amount of the several checks involved in this case to Turrell created and constituted, because of failure of the General Cigar Company, to object, such authority on the part of Turrell."

Reference is made to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 13.

Exception was taken and allowed for failure to give Plaintiff's duly requested instruction as follows:

"I instruct you that, in order for a person to be called upon to object to a wrongful or unauthorized course of practice it is necessary that he know the facts and know the practice, or that a reasonably prudent person or concern under similar circumstances would have had such knowledge in an ordinary intelligent conduct of his or its affairs. The question therefore becomes one of fact for you to determine and the burden of proof in this regard is also upon the Defendant, First National Bank, to show that the General Cigar Company, by giving in the matter of the Seattle and Spokane checks the

attention and care which a reasonably prudent person under similar circumstances would have given them, would have discovered sooner than the General Cigar Company did discover, the method in which cash was withdrawn from the Defendant Bank on said out of town checks. The test in this regard is not what would have been discovered by the highest conceivable degree of care or by the investigation of a person abnormally suspicious, but only the care which an ordinarily prudent person or concern may reasonably be held to be bound to devote to its business and affairs under similar circumstances."

Reference is made to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 14.

Exception was taken and allowed for failure to give Plaintiff's duly requested instruction as follows:

"In considering the question submitted to you by the foregoing instruction, I instruct you that the checks which form the basis of this action and for which Turrell received cash from the First National Bank were drawn on out of town banks other than the defendant bank. The statements received monthly by the Plaintiff from the Defendant bank indicated only the state of the Plaintiff's account with the Defendant bank and did not tend to indicate the state of the accounts on which the checks in question were drawn. Therefore, from an ex-

amination of those statements alone, the wrongful acts of Turrell in question would not be shown to the Plaintiff, nor could it thereby discover such wrongful acts of Turrell in cashing the checks in question. It would be necessary for the Plaintiff to check its accounts with the books of the out of town branches and the accounts that such branches had with the banks with which they did business. It is for you to determine as a question of fact whether the Plaintiff exercised reasonable care or was negligent in its system of checking the transactions between its Portland branch with the accounts from the various other branches. It is to be observed by you that the checks returned to the Spokane branch by the Spokane bank of deposit and to the Seattle branch by the Seattle bank of deposit, would not present any reason to believe that an irregularity had occurred since the Spokane and Seattle banks had a right, when receiving the checks through the First National Bank of Portland, with the approved rubber stamp endorsement of the General Cigar Company at Portland to the order of the First National Bank, to assume that these had passed through the hands of the First National Bank in a regular, proper and orderly manner and the Spokane and Seattle banks had the right to charge the amount of these checks against their respective depositors at those points."

Reference is made to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 15.

Exception was taken and allowed for failure to give Plaintiff's duly requested instruction as follows:

"The Defendant Bank as one of its defenses in this case asserts that the plaintiff, General Cigar Co., knew of the course of conduct on the part of Turrell with reference to the checks in suit, for a long time prior to communicating that knowledge to the Defendant Bank and that the bank was thereby deprived of an opportunity to recover all or a part of the loss. I instruct you that by facts stipulated in this case, it appears that all of Turrell's property was attached by the General Cigar Company at a time when it knew only of Turrell's embezzlement by means of checks payable to cash, not involved in this action, and that shortly thereafter the property so attached and all of Turrell's property acquired during the period of defalcation, was turned over to one J. H. Tipton as Trustee and that the question of the application of the proceeds of said property is one of law upon which this court will pass, the facts being admitted and it affirmatively appears from such admitted facts that no harm has resulted to the First National Bank by reason of any such alleged delay. I instruct you, therefore, to disregard the third further and separate defense on the subject of loss to the Bank through alleged delay in notifying it of the claim which is the subject of this action."

Reference is made to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 16.

Exception was taken and allowed for failure to give Plaintiff's duly requested instruction as follows:

“(If the instruction No. IX foregoing is refused by the Court, the Plaintiff desires to be allowed an exception to such refusal, and asks without waiving its objection to the denial of the foregoing, in the event of its refusal, that the following instruction be given):

“One of the defenses advanced by the Defendant bank is that the Plaintiff delayed unreasonably in informing it of the course of conduct on the part of Turrell with reference to the checks in suit. It was the duty of the Plaintiff General Cigar Co. within a reasonable time after ascertaining the facts, to communicate them to the Bank. The General Cigar Company had the right to make such inquiry as was necessary to ascertain the facts and was charged with the duty of making such inquiry with diligence. It could not be required to give notice as to the amounts claimed to have been diverted until, as a result of diligent inquiry, it had the opportunity to know them itself. In order to sustain this defense on the part of the bank, therefore, it must appear to you from a preponderance of the evidence that the General Cigar Company, after having reason to suspect the facts in connection with the checks in suit, delayed unreasonably in compiling the data on the subject and in communicating the result of its investigation and inquiry to

the First National Bank. If you believe that the first intimation on the subject came from Turrell's confession at the end of May, 1921, and that the wires were used in the effort to ascertain the facts and that copies of documents had to be procured from the various banks and an accounting and audit were essential, and that the data could not reasonably be compiled short of June 20th, at which date the bank was given formal notice of the amount of the several checks, then I instruct you that the General Cigar Company acted with reasonable diligence and the Bank cannot avoid liability under that defense."

Reference is made to the Digest of Testimony hereinbefore set out.

* * * *

Thereafter, on the 6th day of June, 1922, the jury rendered a verdict in favor of defendant and against plaintiff.

After judgment was entered upon said verdict and within the time allowed by the Court, Plaintiff moved for New Trial because of errors at law occurring at the trial and duly excepted to by the Plaintiff, the errors assigned being the rulings to which Exceptions II to XVI were taken as above stated, and on the additional ground "that the verdict is not in accordance with the weight of evidence in that the evidence required at the Jury's hands a finding in favor of the Plaintiff on cause of action arising before the rendering of any monthly statements or before the theory of

estoppel could be invoked because of failure to ascertain the facts as to Turrell's conduct and to act on such information."

Said motion was denied by the Court.

* * * *

And now that the foregoing matters and things may appear and remain of record in this cause, I, the undersigned Trial Judge, sitting at the trial of this action, sign and seal the foregoing Bill of Exceptions reserved by Plaintiff and I certify that the Exceptions alleged by the foregoing Bill to have been taken and allowed were duly taken and allowed as therein set forth after the Jury had been empanelled and while it was still at the Bar; that the foregoing Bill of Exceptions contains all of the evidence and proceedings had in the trial of said action; that the opinion and instruction of the Court is fully set out therein and no other or further instructions were given than as noted in said Bill; that this Bill was served, tendered and filed within the time allowed by law and the orders of this court therefor and the same is hereby accordingly settled, allowed and approved.

Dated this 14th day of November, 1922.

CHARLES E. WOLVERTON,

District Judge.

That on November 17, there was filed in said court the following:

PETITION FOR WRIT OF ERROR.

Comes now General Cigar Company, a corporation,

plaintiff herein, and says that on or about June 6, 1922, a verdict was rendered against your petitioner in this court and in favor of defendant, and that thereafter, on June 6th, 1922, a final judgment was rendered and entered in favor of defendant and against this plaintiff whereby it was adjudged that plaintiff take nothing by this action and that defendant recover its costs and disbursements herein, taxed at \$35.92; that in said judgment and proceeding had prior thereunto certain errors were committed to the prejudice of this plaintiff, all of which will appear more in detail from the assignment of errors which is filed with this petition.

WHEREFORE, feeling itself aggrieved thereby plaintiff prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals, in and for the Ninth Circuit; that plaintiff may be permitted to prosecute the same to said court for the correction of errors so complained of and herewith assigned; that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said court, and that an order be made allowing said writ of error and fixing the amount of the supersedeas bond which the plaintiff shall give, and that upon the giving of said bond, all further proceedings in this court be suspended until the determination of said writ of error by the United States Circuit Court of Appeals, for the Ninth Circuit.

DEY, HAMPSON & NELSON,
GEO. L. BULAND,

Attorneys for Petitioner in Error.

Service of the within petition, by receipt of a copy thereof, duly certified, is hereby accepted at Portland, Oregon, this 17th day of November, 1922.

DOLPH, MALLORY, SIMON & GEARIN,
EDGAR FREED,

Attorneys for Defendant.

On the 17th day of November, 1922, there was served and filed the following

ASSIGNMENT OF ERRORS.

Now comes plaintiff, General Cigar Company, a corporation, plaintiff in error in the above entitled cause, and in connection with its petition for writ of error therein, assigns the following errors which it avers occurred in the trial thereof, and upon which it relies to reverse the judgment entered herein.

I.

The court erred in overruling plaintiff's demurrer to defendant's third further and separate defense to plaintiff's first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh causes of action, said demurrer being on the ground and for the reason that said defense does not state facts sufficient to constitute a defense to said causes of action.

In this regard plaintiff states that it was under no duty to notify defendant of fraud on the part of its employee, N. W. Turrell, and further from said defense it does not appear that defendant suffered damage from lack of said notification.

II.

The court erred in not allowing plaintiff to recall Mr. Louisson for the purpose of impeaching defendant's witness Mr. Jones.

The ruling of the court on this exception and the offer of proof by Mr. Louisson is illustrated by the following extract from the bill of exceptions:

Mr. A. O. Jones was called as a witness on behalf of the defendant and testified that he was vice-president of defendant company and denied that he made a statement to Mr. Turrell that tellers had been instructed not to cash checks such as the ones here concerned.

EXCEPTION NO. 1.

On cross-examination Mr. Jones was asked:

Mr. Jones, are you sure you did not make the statement to him that that was something which was done absolutely against the instructions and orders of the bank?

A. I positively did not say anything about it, Mr. Nelson, I had just one purpose in having Mr. Turrell come down to the bank. I called him from his home.

Q. Do you remember making that statement to Mr. Louisson?

A. About what?

Q. That this practice was absolutely contrary to the orders and instructions of the bank?

A. Not that I remember of, no.

Q. You don't remember telling Mr. Louisson?

A. No, sir.

Q. That it was the bank's fault?

A. No, sir, I did not.

Q. And that the bank ought to make this good?

A. I did not. I certainly would not.

Q. You know Mr. Louisson, don't you?

A. Well, I should say so.

Q. Do you remember talking to him on two different occasions?

MR. GEARIN: Did Louisson testify to that?

MR. NELSON: No, Louisson didn't testify to that, but he will testify to it.

Q. Do you remember talking to him on two different occasions, Mr. Jones, at the bank and telling him that this was something which absolutely should never have been done, that the bank was at fault, and ought to pay it?

A. I did not.

Q. You did not?

A. No, sir.

Excused.

MR. FREED: We rest, your Honor.

JULIUS LOUISSON, recalled in rebuttal for plaintiff.

DIRECT EXAMINATION.

MR. GEARIN: If you are going into that

question, I object to the question. It was not proper cross-examination. It was immaterial matter, and they cannot call a witness now to contradict that one.

MR. NELSON: No objection on the ground it was not proper cross-examination, your Honor, and it is an admission against interest, developed from a witness for the defendant in trying to refresh his recollection whether he had not made this statement to Turrell, whether he had not made similar statements to others. I have the right to ask the question to show conflicting statements.

MR. GEARIN: This is not rebuttal.

MR. NELSON: This is your witness.

THE COURT: I will overrule the objection.

Questions by Mr. Nelson: Mr. Louisson, are you acquainted with Mr. Arthur Jones, vice-president of the First National Bank?

A. Yes, sir, I know him very well.

Q. The gentleman who was just on the stand?

A. Yes, sir.

Q. I wish you would just answer this question yes or no, if you will. Will you state whether or not, on either one or two occasions, you had a discussion with Mr. Arthur O. Jones, vice-president of the First National Bank, with reference to those checks, in the course of which he made the statement that they were cashed absolutely against the rules and practices of the bank and that the bank was at fault, and should pay it without a fight?

MR. GEARIN: Objected to.

THE COURT: That is not exactly what was stated. It seems to me you will have to have the reporter read what was stated.

Q. Will you please consider I am incorporating in this question now just the language I used in asking questions to Mr. Jones? Now state whether or not Mr. Jones, on either one or two occasions, ever made the statement to you that the cashing of these checks was not in conformity to the practices, and against the orders of the bank, and that the bank was at fault, and ought to pay?

MR. GEARIN: I object to that, if the court please, as incompetent and immaterial, and not rebuttal. It was drawn out by themselves, and they cannot build up a man of straw here and tear him down again.

THE COURT: It was asked for the purpose of impeachment?

MR. NELSON: Yes.

THE COURT: And that question was put to the witness Mr. Jones. It was asked for the purpose of impeachment. I think it is relevant and competent. I will overrule the objection.

MR. GEARIN: Save an exception.

Q. Answer the question, yes or no.

A. The words were not exactly the same, but it meant the same.

THE COURT: That is as far as you can go.

A. Not the same words.

Q. Will you state whether the substance was what was given you?

THE COURT: I think that is as far as you can go.

MR. GEARIN: You cannot impeach on substance.

MR. NELSON: Will your Honor permit me to call Mr. Jones for one question? I did not know the exact words. I would like to know whether he said the substance of that to Mr. Louisson.

THE COURT: I suppose you might probably put the substance.

MR. NELSON: Just that one question.

Excused.

A. O. JONES, recalled for further cross-examination.

Questions by Mr. Nelson: Mr. Jones, will you state whether or not you said the substance of what I said to you to Mr. Louisson?

A. I had many conversations with Mr. Louisson on the subject. I told Mr. Louisson in many conversations we had about this matter that I was very, very sorry it happened, but I never told him the bank was liable in any way for paying these checks.

Q. You didn't either state the words which I used or the substance of it, which amounts to this: That the practice was an irregular one and against the bank's instructions, and that the bank was at fault and should pay the matter without suit? Did you state the substance of that to him?

A. We do a lot of little irregular things, seemingly, for the convenience of the customers, oftentimes, and I never told Mr. Louisson that the bank was responsible for this shortage.

Q. Did you say to him any part of what I have said to you?

THE COURT: I think that is going too far.

A. I told him I regretted the whole thing. I said, "I am very sorry it has happened."

Q. You said the bank does irregular things, but you deny making any statement in substance of what I have said, to him?

A. I don't quite understand you, Mr. Nelson.

THE COURT: Those things must be specific, and when you speak of the substance of a thing, it must be very, very like, and you cannot go beyond that.

MR. NELSON: My meaning, your Honor, is this, if I may reframe that:

Q. You understand, Mr. Jones, I am not attempting to give a stenographic report of a conversation.

A. Yes, I know.

Q. But did you say that, or did you say something which had the general purport of that?

A. The only thing I ever told Mr. Louisson was I was sorry the whole thing had happened; I regretted it.

Q. Mr. Jones, I will ask you this question: Did you say this or words in substance like these:

"I don't see why the bank is contesting this matter. They are liable for it, and ought to pay it."

A. No.

Q. You don't recall saying that?

A. I do not.

MR. GEARIN: I certainly object to this system of undertaking to impeach a witness. The rule is very strict upon it. They must give the time, place and persons present and the substance of the identical conversation they are impeaching on. He is undertaking to lay a foundation for three different conversations.

THE COURT: I think this matter is too indefinite.

Q. Let me ask this: You remember conversing with Mr. Louisson in the First National Bank, Mr. Jones, do you not, on this subject?

A. Dozens of times, yes.

Q. On this particular subject?

A. Yes.

Q. And you don't remember these words, to this effect, being used in any of those conversations?

A. No, I don't.

Q. It would not do any good to tell you any particular date?

A. No, I don't. I really don't. If I did, I would tell you, but I don't.

MR. NELSON: Now, I would like to recall Mr. Louisson.

THE COURT: I will sustain the objection to that. You did not fix any time, place or persons present, or the exact matter that was spoken.

MR. NELSON: If the court please, I would like to make an offer of proof in that regard, if I may.

THE COURT: You may make your offer of proof. You already have it in the record, the whole thing.

MR. NELSON: That is understood, then. The proof I offer is that he did make those statements.

THE COURT: Very well.

MR. NELSON: We may have an exception to the exclusion of that?

THE COURT: Yes, you may have your exception.

III.

The court erred in instructing the jury that if it believed from the evidence that Turrell did not have authority to cash the checks in question, but if they further believed from the evidence the General Cigar Company should have detected the fraud by reasonable diligence, then the jury must find for the defendant in regard to those checks which were cashed after the General Cigar Company should have caught the practices of Turrell, the charge being in verbatim as follows:

“It is a general principle that that party should

bear the loss whose conduct makes the loss possible. If you believe from the evidence that Turrell did not have actual authority to receive the money on the checks described in the pleadings for the General Cigar Company, but that the General Cigar Company by the exercise of reasonable care in the conduct of its business should have discovered Turrell's practice in cashing its checks at the defendant bank, and if you believe that the General Cigar Company did not prior to January 1, 1921, make claims to the defendant bank that Turrell had no such authority, you must find for the defendant bank on all the causes of action involving the checks cashed after the time when the General Cigar Company should have discovered Turrell's said practice." (Bill of Exceptions, p. 107, *supra*.)

In this regard plaintiff states that there was no duty resting on plaintiff owing to defendant to exercise reasonable diligence.

IV.

The court erred in instructing the jury that if the plaintiff should have detected the fraud by an examination of the vouchers returned from the First National Bank it would be precluded from recovering.

The exact charge is set forth under the sixth assignment of error. The plaintiff states in this regard that there was no evidence showing that plaintiff, by such examination, should have detected the fraud of said Turrell.

V.

The court erred in instructing the jury that if they should find that from a return of the vouchers to the Spokane branch of plaintiff company from the Spokane Bank, plaintiff, with reasonable diligence, should have discovered that a fraud existed and did not discover it, that they would be estopped from asserting claim against the defendant so far as checks drawn upon the Spokane Bank were concerned.

The exact charge is set forth under the sixth assignment of error. Plaintiff states in this regard that there were no facts introduced in evidence to justify such a finding by the jury of lack of diligence, and also on the further ground that the delay could not have injured defendant in regard to the fraud occurring prior thereto. (Bill of exceptions, p. 108, *supra*.)

VI.

The court erred in instructing the jury that if they should find that from a return of the vouchers to the Seattle branch of plaintiff company from the Seattle bank, the plaintiff, with reasonable diligence, should have discovered that a fraud existed and did not discover it, that they would be estopped from asserting claim against the defendant so far as checks drawn upon the Seattle bank were concerned.

In this regard plaintiff states that there were no facts introduced in evidence to justify such a finding by the jury of lack of diligence, and also on the further ground that the delay could not have injured defendant

in regard to the fraud occurring prior thereto. (Bill of exceptions, p. 109, *supra*.)

The parts of the instructions to which assignments of error IV, V and VI relate, are as follows:

As it respects the second answer, it is a rule of law that a depositor must examine the bank's periodical statements and report to the bank without any unreasonable delay any errors he may discover, or the bank may regard his silence as an admission that the entries as shown are correct.

It is alleged, among other things, that at all times from July 23, 1919, to December 15th, of the same year, the plaintiff, in addition to the three accounts carried in the defendant bank, carried accounts in the Spokane & Eastern Trust Company, of Spokane, and the Union National Bank, of Seattle, and that each of these banks, including the defendant bank, rendered a monthly statement to plaintiff of its account therewith; that thereby the plaintiff was advised as to the exact condition of its account in each of these banks, respectively, touching the amounts of money drawn from the bank by Turrell, but made no objection thereto, and gave the bank no information touching any irregularity affecting such accounts.

If you find from the evidence in the case that such were the facts, and that the plaintiff was so advised and failed, within a reasonable time, to advise the defendant bank of such irregularities, then the plaintiff would be estopped now to assert that

defendant was liable for its acts in paying the money over to Turrell in pursuance of his request or demand, and your verdict should be for the defendant.

And in this relation, I further instruct you that a depositor who has permitted his agent to verify the bank's statements is charged with notice of the fraud which would be disclosed by the examination of such statements, though not with the agent's knowledge of the fraud he may have acquired otherwise than through such statements.

If you believe from the evidence a reasonably careful examination of the monthly statements rendered and cancelled vouchers returned to the plaintiff, General Cigar Company, by the defendant, First National Bank, and the Spokane & Eastern Trust Company, would have disclosed to the General Cigar Company the fact that the checks involved in the first, fourth, fifth and ninth causes of action had not been credited to the General Cigar Company's accounts with the First National Bank, and if you also believe that prior to July 20, 1921, the General Cigar Company made no objections concerning plaintiff's account with defendant or the cashing of these checks, you must find for the defendant on the first, fourth, fifth and ninth causes of action.

If you believe from the evidence that a reasonably careful examination of the monthly statements rendered and cancelled vouchers returned to the

plaintiff by the First National Bank and the Union National Bank would have disclosed to the General Cigar Company the fact that the checks involved in the second, third, sixth, tenth and eleventh causes of action had not been credited to the General Cigar Company's account with the First National Bank, and if you also believe that prior to July 20, 1921, the General Cigar Company made no objections concerning plaintiff's account with defendant or the cashing of these checks, you must find for the defendant on the second, third, sixth, tenth and eleventh causes of action.

(Bill of exceptions, pp. 109, 110, supra.)

VII.

The court erred in instructing the jury that the burden of proof was on the plaintiff to show that money had been paid by the defendant without authority to the plaintiff's agent. The instructions in this respect are as follows:

Now, gentlemen of the jury, I instruct you further that the burden of proof lies with the plaintiff to show that the defendant bank paid out money without authority from the plaintiff, either real or apparent.

The burden of proof, gentlemen, is simply the weight of the testimony. It is such weight as would carry the scales of justice down upon one side or the other; and in considering the question as to whether these parties have made out their case by

the burden of proof, as I have mentioned to you, you will determine whether the weight of testimony is upon that side.

(Bill of exceptions, p. 111, *supra*.)

Plaintiff states that the burden of establishing by a preponderance of the evidence the fact of agency is upon the party who relies upon the same to establish its case, to wit, the defendant in error.

VIII.

The court erred in refusing to give plaintiff's duly requested instruction as follows:

This is an action instituted by General Cigar Company Inc., a corporation, against First National Bank of Portland, Oregon, a National Banking corporation. It is admitted that both the plaintiff and defendant are incorporated as alleged.

There are several causes of action in the plaintiff's complaint and inasmuch as the answer to each and the reply to the answer involve precisely the same issues, I will simply take the first of these and you will understand that what I have to say as to the first applies with equal force to each of the others.

The General Cigar Company conducted a wholesale and retail cigar and tobacco business in the City of Portland, Oregon, and the same corporation had a branch at Spokane, Washington, engaged in a similar line of business. The Spokane branch being indebted to the Portland branch for

merchandise, issued its check payable to the General Cigar Company, Portland, Oregon, in the sum of \$1293.58. This check was drawn on the Spokane & Eastern Trust Co., a banking corporation of Spokane, Washington. The check was received at the Portland office and there was endorsed upon the check by rubber stamp endorsement the following:

“Pay to the order of First National Bank
 335 Portland, Oregon. 335
 General Cigar Company. Inc.
 M. A. Gunst Branch
 M. A. Gunst & Co.”

I instruct you that the effect of affixing such a stamp to the back of a check is to make the check payable to a special banking corporation, namely, the First National Bank of Portland, Oregon, and is a method of endorsement commonly utilized for purposes of deposit, and had been so utilized throughout the dealings of the General Cigar Company with the First National Bank.

It further appears that one Neil W. Turrell, Cashier of the General Cigar Co. had by virtue of a letter or power of attorney from the General Cigar Co. lodged with the First National Bank in July, 1919, been specifically authorized to sign checks on the funds of the General Cigar Co. or deposit with the First National Bank. Turrell took the Spokane check which I have described to you, endorsed as I have said to the defendant, First

National Bank, and the defendant, First National Bank, to which the check was made payable by endorsement, paid the face amount thereof in cash to the said Turrell, and then in turn collected the amount of the check from the bank on which it was drawn, that is, the Spokane & Eastern Trust Company at Spokane. It is admitted that the Bank did not credit the amount of the check to the General Cigar Company's account at Portland, Oregon, and that unless the bank had authority to pay the cash to Turrell and unless the payment to Turrell was in law and in fact a payment to the General Cigar Company, or unless you should find the bank is released from liability because of other matters to which I shall hereafter advert, the General Cigar Company has not been paid and the First National Bank is indebted to it in the amount of the check. Whether or not such liability exists is the question for you in this case, and it becomes necessary for me to explain to you how an agency is created, what authority an agent ordinarily has, and what are the respective rights and duties of the depositor and of the bank.

(Bill of exceptions, p. 112, *supra*.)

IX.

The court erred in failing to give plaintiff's duly requested instruction as follows:

I instruct you that when a negotiable instrument, such as the check in the case at bar, is endorsed specifically to a banking corporation, that

the party having physical possession of such a check has not from the possession of such check alone, any authority to negotiate the same or receive the proceeds thereof.

(Bill of exceptions, p. 115, *supra*.)

X.

The court erred in failing to give plaintiff's duly requested instruction as follows:

I instruct you that an agent has the authority which is actually, formally and expressly conferred upon him and the power necessary to carry his instructions into effect, and also such powers as he is held out by the principal to the world and to those dealing with him as having. The principal has a right to limit and define this authority and when he does so limit it, the agency for those particular purposes, at least, becomes a special agency, and all persons must have regard to the limitations imposed, and if they deal with the agent on such a special field of agency in any other way than the way prescribed by the principal, the principal is not ordinarily bound. In this case it is not disputed that there was conferred upon the agent, Turrel, by a letter or power of attorney, certain specific authority with reference to checks, i. e., the authority to sign checks on certain designated accounts and to sign these checks in a certain designated way, that is, as Cashier. That thereupon manner.

(Bill of exceptions, p. 115, *supra*.)

XI.

The court erred in failing to give plaintiff's duly requested instruction as follows:

I instruct you that the letter or power of attorney was silent on the subject of endorsements; that the rubber stamp endorsement making a check received by a depositor on an out of town bank payable to the order of the local bank in which he deposits, is one not required to be affixed by the principal himself or by any one holding any special powers and passes title to the fund to the depository bank alone. When the check is so stamped it became the bank's duty to the principal, the General Cigar Company, to decline to cash any checks on the funds of the depositor save and except those executed in the manner specified in the power of attorney, unless it has been shown to you that other or broader authority was conferred in some effective and is deposited with the bank to which it is made payable, by the rubber stamp endorsement, it is placed to the credit of the depositor and no question ordinarily arises as to the individual or the authority of the individual affixing the rubber stamp. (Bill of exceptions, p. 116, supra.)

XII.

The court erred in failing to give plaintiff's duly requested instruction as follows:

In this case it is claimed by the defendant bank that the rubber stamp which I have described was

used for another purpose than that of deposit, that is, that it was used for the purpose of obtaining cash over the counter and that Turrell, to whom I have referred, had authority from the plaintiff, General Cigar Co., to obtain through the use of said rubber stamp endorsement, cash from the defendant bank on checks received by the General Cigar Co. drawn on out of town banking institutions. I instruct you that the burden of proof is on the defendant, First National Bank, to show that Turrell had the authority which the bank claims. There is no presumption of such authority. Neither the letter of July, 1919, authorizing Turrell to sign checks, nor the fact that he or other employees could stamp out of town checks payable to the order of the First National Bank creates of itself any authority on Turrell to obtain cash on such facts and it is incumbent upon the defendant, First National Bank, seeking to justify payment of cash to Turrell thereon, to prove to you by a preponderance of evidence that Turrell had such authority.

In considering the question of whether or not such authority existed, you are not only entitled, but it is your duty to consider all the facts in testimony and the circumstances surrounding the parties and attending the transactions and to determine from such a consideration whether or not the bank has established Turrell's authority to cash said checks and the bank's right to pay them instead of placing them to the credit of its depositor. Gen-

eral Cigar Company. The bank can justify itself and prevent a recovery of this case only by proving that the money was placed to the credit of the General Cigar Company or was otherwise used for the benefit of the General Cigar Company, and, it being admitted that it was not credited to the General Cigar Company but was paid to Turrell, the bank must show that when it made a payment to Turrell, it was under Turrell's authority paying the money to the General Cigar Company. (Bill of exceptions, p. 117, *supra*.)

XIII.

The court erred in failing to give plaintiff's duly requested instruction as follows:

I instruct you that the letter or power of attorney of July, 1919, clearly required the signature for the General Cigar Company of two persons, Julius Louisson, the Manager, or Neil W. Turrell, Cashier, and that meant their signature in a representative capacity, as manager or cashier respectively, and not merely as individuals. There has been no testimony to show any authority to the bank or any practice or course of dealing between the parties which would justify the bank in paying out cash on a rubber stamp signature without the personal signature of either the manager or cashier as such, unless it can be said that the payment of the amount of the several checks involved in this case to Turrell created or constituted, because of

failure of the General Cigar Company, to object, such authority on the part of Turrell.
(Bill of exceptions, p. 118, *supra*.)

XIV.

The court erred in failing to give plaintiff's duly requested instruction as follows:

I instruct you that, in order for a person to be called upon to object to a wrongful or unauthorized course of practice it is necessary that he know the facts and know the practice, or that a reasonably prudent person or concern under similar circumstances would have had such knowledge in an ordinarily intelligent conduct of his or its affairs. The question therefore becomes one of fact for you to determine and the burden of proof in this regard is also upon the defendant, First National Bank, to show that the General Cigar Company, by giving in the matter of the Seattle and Spokane checks the attention and care which a reasonably prudent person under similar circumstances would have given them, would have discovered sooner than the General Cigar Company did discover, the method in which cash was withdrawn from the defendant bank on said out of town checks. The test in this regard is not what would have been discovered by the highest conceivable degree of care or by the investigation of a person abnormally suspicious, but only the care which an ordinarily prudent person or concern may reasonably be held

to be bound to devote to its business and affairs under similar circumstances.

(Bill of exceptions, p. 119, *supra*.)

XV.

The court erred in failing to give plaintiff's duly requested instruction as follows:

In considering the question submitted to you by the foregoing instructions, I instruct you that the checks which form the basis of this action and for which Turrell received cash from the First National Bank were drawn on out of town banks other than the defendant bank. The statements received monthly by the plaintiff from the defendant bank indicated only the state of the plaintiff's account with the defendant bank and did not tend to indicate the state of the accounts on which the checks in question were drawn. Therefore, from an examination of these statements alone, the wrongful acts of Turrell in question would not be shown to the plaintiff, nor could it thereby discover such wrongful acts of Turrell in cashing the checks in question. It would be necessary for the plaintiff to check its accounts with the books of the out of town branches and the accounts that such branches had with the banks with which they did business. It is for you to determine as a question of fact whether the plaintiff exercised reasonable care or was negligent in its system of checking the transactions between its Portland branch with the accounts from

the various other branches. It is to be observed by you that the checks returned to the Spokane Branch by the Spokane bank of deposit and to the Seattle branch by the Seattle bank of deposit, would not present any reason to believe that an irregularity had occurred since the Spokane and Seattle banks had a right, when receiving the checks through the First National Bank of Portland, with the approved rubber stamp endorsement of the General Cigar Company at Portland to the order of the First National Bank, to assume that these had passed through the hands of the First National Bank in a regular, proper and orderly manner and the Spokane and Seattle banks had the right to charge the amount of these checks against their respective depositors at those points.
(Bill of exceptions, p. 120, *supra*.)

XVI.

The court erred in failing to give plaintiff's duly requested instruction as follows:

The defendant bank as one of its defenses in this case asserts that the plaintiff, General Cigar Company, knew of the course of conduct on the part of Turrell with reference to the checks in suit, for a long time prior to communicating that knowledge to the defendant bank, and that the bank was thereby deprived of an opportunity to recover all or a part of the loss. I instruct you that by facts stipulated in this case, it appears that all of Tur-

rell's property was attached by the General Cigar Company at a time when it knew only of Turrell's embezzlement by means of checks payable to cash, not involved in this action, and that shortly thereafter the property so attached and all of Turrell's property acquired during the period of defalcation, was turned over to one J. H. Tipton as Trustee and that the question of the application of the proceeds of said property is one of law upon which this court will pass, the facts being admitted and it affirmatively appears from such admitted facts that no harm has resulted to the First National Bank by reason of any such alleged delay. I instruct you, therefore, to disregard the third further and separate defense on the subject of loss to the bank through alleged delay in notifying it of the claim which is the subject of this action.

(Bill of exceptions, p. 122, supra.)

XVII.

The court erred in failing to give plaintiff's duly requested instruction as follows, which instruction plaintiff requested in case the instruction set forth in the preceding assignment of error was refused.

One of the defenses advanced by the defendant bank is that the plaintiff delayed unreasonably in informing it of the course of conduct on the part of Turrell with reference to the checks in suit. It was the duty of the plaintiff, General Cigar Company, within a reasonable time after ascertaining

the facts, to communicate them to the bank. The General Cigar Company had the right to make such inquiry as was necessary to ascertain the facts and was charged with the duty of making such inquiry with diligence. It would not be required to give notice as to the amounts claimed to have been diverted until, as a result of diligent inquiry, it had the opportunity to know them itself. In order to sustain this defense on the part of the bank, therefore, it must appear to you from a ponderance of the evidence that the General Cigar Company, after having reason to suspect the facts in connection with the checks in suit, delayed unreasonably in compiling the data on the subject and in communicating the result of its investigation and inquiry to the First National Bank. If you believe that the first intimation on the subject came from Turrell's confession at the end of May, 1921, and that the wires were used in the effort to ascertain the facts and that copies of documents had to be procured from the various banks and an accounting and audit were essential, and that the data could not reasonably be compiled short of June 20th, at which date the bank was given formal notice of the amount of the several checks, then I instruct you that the General Cigar Company acted with reasonable diligence and the bank cannot avoid liability under that defense.

(Bill of exceptions, p. 123, *supra*.)

XVIII.

The court erred in denying plaintiff's motion for a new trial on the ground of errors at law occurring at the trial and duly excepted by the plaintiff, the errors assigned being the rulings to which assignments of error III to XVII were taken, as above stated, and on the following ground:

"That the verdict is not in accordance with the weight of evidence in that the evidence required at the jury's hands a finding in favor of the plaintiff on cause of action arising before the rendering of any monthly statements or before the theory of estoppel could be invoked because of failure to ascertain the facts as to Turrell's conduct and to act on such information."

WHEREFORE, plaintiff prays that the said judgment be reversed and that said cause be remanded to the Honorable District Court of the United States, for the District of Oregon, for a new trial, and that plaintiff in error recover its costs and disbursements on this review.

DEY, HAMPSON & NELSON,
GEO. L. BULAND,

Attorneys for Plaintiff.

Due service of the foregoing assignment of errors is hereby accepted at Portland, Oregon, this 17th day of November, 1922.

DOLPH, MALLORY, SIMON & GEARIN,
EDGAR FREED,

Attorneys for Defendant.

On the 23rd day of November, 1922, there was duly made and entered the following

**ORDER ALLOWING WRIT OF ERROR
AND FIXING AMOUNT OF BOND**

On this 23rd day of November, 1922, came plaintiff and filed herein and presented to this court its petition praying for the allowance of writ of error, and therewith its assignment of errors intended to be urged by it, and also praying that the amount of the supersedeas bond to be given by it be fixed, and that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof, it is **ORDERED** that said writ of error be and the same is hereby allowed, as prayed for, upon the plaintiff giving a bond as provided by law in the penal sum of **FIVE HUNDRED DOLLARS**, and that further proceedings in said cause in this court be suspended pending the determination of said writ of error by the United States Circuit Court of Appeals, for the Ninth Circuit.

CHAS. E. WOLVERTON,
District Judge.

That on said day there was filed in said court the following

**BOND ON WRIT OF ERROR
KNOW ALL MEN BY THESE PRESENTS,**

that **GENERAL CIGAR COMPANY**, corporation, as principal, and **UNITED STATES FIDELITY & GUARANTY COMPANY**, a Maryland corporation, as surety, are held and firmly bound unto the First National Bank of Portland, Oregon, defendant herein, in the sum of **FIVE HUNDRED DOLLARS**, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

WHEREAS, lately at a regular term of the District Court of the United States, for the District of Oregon, sitting at Portland in said district, in an action pending in said court between General Cigar Company, a corporation, as plaintiff, and First National Bank of Portland, Oregon, as defendant, on the law docket of said court, final judgment was rendered against the said General Cigar Company that it take nothing by its complaint therein, and in favor of said defendant for the sum of \$35.92, and the said General Cigar Company has obtained a writ of error to reverse said judgment, and a citation directed to the First National Bank of Portland, Oregon, defendant in error, citing it to be and appear before the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, in the State of California, within thirty days from the date of the service said citation.

Now the condition of the above obligation is such that if the said General Cigar Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obli-

gation to be void, else to remain in full force and effect.

IN WITNESS WHEREOF, General Cigar Company, a corporation, has caused these presents to be executed by its duly authorized agent, and the said surety has likewise caused these presents to be executed by its duly authorized attorney in fact this 23rd day of November, 1922.

GENERAL CIGAR COMPANY,

By Roscoe C. Nelson,

Attorney in Fact.

UNITED STATES FIDELITY &
GUARANTY COMPANY,

By Douglas R. Tate,

Attorney in Fact.

Service of the within bond by receipt of a duly certified copy thereof is accepted at Portland, Oregon, this 23rd day of November, 1922.

DOLPH, MALLORY, SIMON & GEARIN,
EDGAR FREED,

Attorneys for Defendant.

On November 23rd, 1922, there was issued the following Writ of Error:

In the United States Circuit Court of Appeals for the Ninth Circuit.

GENERAL CIGAR COMPANY, a
corporation

Plaintiff in Error,

vs.

Writ of Error.

FIRST NATIONAL BANK OF PORTLAND,
Oregon, a National Banking corporation,
Defendant in Error.

THE UNITED STATES OF AMERICA, ss.
THE PRESIDENT OF THE UNITED
STATES OF AMERICA.

To the Judge of the District Court of the United States
for the District of Oregon:

GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable CHARLES E. WOLVERTON, one of you, between GENERAL CIGAR COMPANY, a corp., Plaintiff and Plaintiff in Error, and FIRST NATIONAL BANK OF PORTLAND, Ore., Defendant and Defendant in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held;

that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the HONORABLE WILLIAM
HOWARD TAFT,

Chief Justice of the Supreme Court of the
United States this 23rd day of November,
1922.

G. H. MARSH,
Clerk of the District Court of the United
States for the District of Oregon.

By F. L. Buck, Deputy.

And on the 24th day of November, 1922, there was
filed in said court, the following

CITATION ON WRIT OF ERROR
UNITED STATES OF AMERICA,
STATE AND DISTRICT OF OREGON,—ss.
TO FIRST NATIONAL BANK OF PORT-
LAND, OREGON, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be held in the City of San Francisco, in the State of California, within thirty days from the 23rd day of November, 1922, pursuant to a writ of error on file in the office of the clerk of the District Court of the United States, for the District of Oregon,

in that certain action wherein General Cigar Company, a corporation, is plaintiff, and you, First National Bank of Portland, Oregon, is defendant in error, to show cause, if any there be, why the judgment given, made and entered in favor of the said First National Bank of Portland, Oregon, in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Charles E. Wolverton, United States District Judge for the District of Oregon, this 23rd day of November, 1922.

CHARLES E. WOLVERTON,
District Judge.

Service of the foregoing citation by receipt of duly certified copy thereof is hereby accepted for defendant at Portland, Oregon, this 24th day of November, 1922.

DOLPH, MALLORY, SIMON & GEARIN,
EDGAR A. FREED,

Attorneys for Defendant.

On December 8, 1922, there was filed the following

STIPULATION

IT IS HEREBY STIPULATED AND AGREED between the parties hereto by their respective attorneys, as follows:

I.

That the Transcript of Record on Writ of Error in said cause shall consist of the following:

Complaint.

Demurrer.

Opinion of Court Thereon.

Order Denying Demurrer.

Answer.

Demurrer to Answer.

Order Allowing Withdrawal of Demurrer in Part.

Opinion on Demurrer.

Order Overruling Demurrer.

Reply.

Judgment Order.

Order Extending Time for Filing Motion for New Trial.

Notice of Presentation of Motion for New Trial.

Notice of Intention to Move for New Trial.

Order Denying Motion for New Trial.

Order Extending Time for Filing Bill of Exceptions.

Order Extending Time for Filing Bill of Exceptions.

Bill of Exceptions.

Petition for Writ of Error.

Assignment of Error.

Order allowing Writ of Error and Fixing Amount of Bond.

Bond on Writ of Error.

Writ of Error.

Citation.

This Stipulation.

Clerk's Certificate.

II.

It is further Stipulated and Agreed in this connection that all pleadings relating to the Seventh and Eighth causes of Action may be omitted from the Transcript of Record; that only so much of Defendant's Answer as relates to the first cause of action need be printed in said Transcript of Record and it is hereby stipulated and agreed that the same denials, admissions and allegations were made in respect to the remaining causes of action as were made to the first cause of action, with the exception of such variations as were made appropriate by the varying dates and amounts of the checks concerned; that only so much of Plaintiff's Reply to Defendant's Answer need be printed in said Transcript of Record as relates to Defendant's Answer to said first cause of action, it being stipulated and agreed that Plaintiff's Reply to Defendant's Answers to the various other causes of action contain the same admissions, denials and affirmative allegations as the Reply to Defendant's answer to Plaintiff's first cause of action, with such variation as are rendered necessary and appropriate by reason of the variation in dates and amounts of the checks concerned.

III.

That in printing said Transcript of Record, the caption, title and clerk's endorsement of filing of papers and other formal matters may be omitted.

IV.

Attorneys for Plaintiff in Error herein having prepared and compared with the original record the within printed Transcript.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the parties to the within proceedings for WRIT OF ERROR by and through their respective attorneys, that the within printed record tendered to the Clerk of the United States District Court for the District of Oregon for his certificate is a true Transcript of the record in the within cause and that the Clerk of the said Court shall certify the said printed Transcript without comparison thereof with the original record.

V.

That an order may be entered herein, on the application of Plaintiff in Error, enlarging the time within which to file the record and docket the above entitled cause with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to and inclusive of the 1st day of January, 1923.

DATED at Portland, Oregon, DECEMBER 8, 1922.

DEY, HAMPSON & NELSON,
GEO. L. BULAND,
Attorneys for Plaintiff in Error.

DOLPH, MALLORY, SIMON & GEARIN,
EDGAR FREED,
Attorneys for Defendant in Error.

IN THE DISTRICT COURT OF THE UNITED
STATES, FOR THE DISTRICT OF OREGON
GENERAL CIGAR COMPANY, a

corporation,

Plaintiff,

vs.

FIRST NATIONAL BANK OF
PORTLAND, Oregon, a National
Banking corporation,

Defendant.

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD

United States of America,
District of Oregon,—ss.

The attorneys for the respective parties to the within proceedings having stipulated that the within printed Transcript of Record, as prepared, compared and tendered to me for certification by the attorneys for the Plaintiff in Error, is a true Transcript of the Record in this cause in that I shall certify the same without comparison.

NOW, THEREFORE, in accordance with the said Stipulation, I, G. H. MARSH, Clerk of the above entitled Court, do hereby certify that the foregoing Transcript of Record upon Writ of Error in the case in which GENERAL CIGAR COMPANY, a corporation, is Plaintiff and Plaintiff in Error, and FIRST NATIONAL BANK OF PORTLAND, Oregon, a Na-

tional Banking corporation is Defendant and Defendant in Error, is a full, true and correct Transcript of the Record and proceedings had in said court in said cause as the same appear of record and on file at my office and in my custody, the same having been prepared by attorneys for Plaintiff in Error.

And I further certify that the fee for certifying to the within Transcript has been paid by the said Plaintiffs in Error.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District this —— day of December, 1922.

G. H. MARSH,
Clerk.

No. . . . 3958.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GENERAL CIGAR COMPANY, INC., a Corporation,	} Plaintiff in Error, vs. FIRST NATIONAL BANK OF PORT- LAND, Oregon, a National Banking Corporation, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

On Writ of Error to the District Court of the United
States, for the District of Oregon, Honorable
Charles E. Wolverton, District Judge.

DEY, HAMPSON & NELSON and
GEORGE L. BULAND,
Attorneys for Plaintiff in Error.

FILED

APR 28 1923

R. D. MONCKTON
CLERK

NAMES AND ADDRESSES OF COUNSEL

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL CIGAR COMPANY, INC., a Corporation,	} Plaintiff in Error,
vs.	
FIRST NATIONAL BANK OF PORT- LAND, Oregon, a National Banking Corporation,	
	} Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

On Writ of Error to the District Court of the United
States, for the District of Oregon, Honorable
Charles E. Wolverton, District Judge.

STATEMENT

(The numbers in parenthesis throughout this brief,
unless otherwise stated, refer to pages of the Transcript
of Record.)

The plaintiff, General Cigar Company, Inc., is a
New York corporation engaged in the wholesale and
retail tobacco business with branches in a number of
cities including Portland, Seattle, and Spokane. The

defendant, First National Bank of Portland, Oregon, is a national banking corporation and has been for many years the bank of deposit used by plaintiff's Portland branch.

This litigation presents for determination the question as to which corporation, the First National Bank or the General Cigar Company, should bear the loss resulting from the dishonest acts of one Neil W. Turrell, an employee of the plaintiff, accomplished through the cashing of checks at the defendant bank in the manner hereinafter stated.

Plaintiff's complaint presents eleven causes of action. As two of these, the 7th and 8th causes of action, were eliminated by stipulation of the parties, we are now concerned with but nine of these causes of action. In the first cause of action it is alleged that on or about December 13, 1919, plaintiff's Spokane branch drew a check on the Spokane and Eastern Trust Company, a bank located at Spokane, Washington, payable to itself in the sum of \$1,293.58, which check was transmitted by the Spokane branch to the Portland branch. The Portland branch received the check and endorsed it with a rubber stamp endorsement in form substantially as follows: "Pay to the order of First National Bank, General Cigar Company, Inc." The exact form appears on page 4 of the Transcript. This form, it is alleged, was one uniformly and continuously used by the plaintiff for purposes of deposit in defendant bank. It is further alleged that Turrell wrongfully and without authority from plaintiff converted this check to his

own use and that he procured the defendant bank to cash the check paying him the face amount thereof; that subsequently the defendant bank presented the check to the drawee bank and received the sum for which it was drawn but that defendant had not paid plaintiff or credited its account with the sums realized on the check cashed as aforesaid for Turrell, and that by reason of those facts it became justly indebted to plaintiff in the face amount of the check. The remaining eight causes of action in which we are now interested follow the allegations of the first cause of action but involve additional checks, some of which had been drawn by the Spokane branch on the Spokane and Eastern Trust Company and others had been drawn by the Seattle branch of Plaintiff's company on the Union National Bank, a Seattle bank. It will be observed that the first check involved in this action was drawn on December 13, 1919, and the last check on November 26, 1920. The total amount of these checks is \$10,077.60.

A demurrer interposed to this complaint was overruled and the defendant answered. The defendant made certain denials and pleaded four defenses affirmatively.

The first defense (32) alleged that the plaintiff had three accounts with the defendant, and that Turrell was authorized by power of attorney to withdraw moneys from each of these accounts, and that plaintiff was also authorized to cash checks such as the ones concerned in plaintiff's complaint. This defense is, therefore, sub-

stantially that Turrell had authority to cash the checks as he did in behalf of plaintiff.

The second defense (34) alleges that the plaintiff received monthly statements and vouchers from the defendant bank and from the Spokane and Eastern Trust Company and the Union National Bank, the drawee bank, and that by a proper check of its business it should have discovered the embezzlements by Turrell and that not so discovering such embezzlements and consequently not notifying the defendant of Turrell's lack of authority to do what he was doing that plaintiff became estopped to deny that Turrell had authority to receive the payments made by the defendant to him in cashing the checks.

The third defense (37) alleges that the plaintiff first notified the defendant of the fraud of Turrell on July 20, 1921, and that it had known of the fraud for some time prior thereto, and that by reason of plaintiff's failure promptly to notify the defendant of the fraud the defendant was deprived of the opportunity to proceed against Turrell and obtain restitution.

The fourth defense (38) alleges that plaintiff had recovered from Turrell certain properties to apply on the embezzlements concerned in this action as well as other misappropriations by him, and that defendant bank had an equitable right to share in the sums so recovered.

A demurrer was interposed by plaintiff to defendant's third affirmative defense which demurrer was overruled, and by a reply the material allegations of

defendant's answer were put in issue. The cause proceeded to trial before a jury. The parties agreed (73) that defendant should participate, if judgment should be rendered against it, in the proceeds realized from Turrell, and accordingly the fourth affirmative defense was eliminated by stipulation.

The facts developed at the trial may be summarized as follows:

Neil W. Turrell was employed by the General Cigar Company as bookkeeper and on July 1, 1919, was promoted to cashier of the Portland office of the General Cigar Company. His duties were to have charge of the cash and act as head office clerk, and written authority was conferred upon him to sign checks drawn by the plaintiff on the First National Bank. The letter of authority appears on page 74 of the Transcript and this letter was the only written authority conferred upon Turrell. Deposits in the defendant bank were generally made by plaintiff's bookkeeper who would place a rubber stamp endorsement on the checks and take them to the bank which credited the plaintiff's account. The rubber stamp endorsement was in the form alleged in the complaint: "Pay to the order of the First National Bank, General Cigar Company, Inc." Other evidence was adduced by both parties bearing upon the authority of Turrell, but as all questions of fact have been determined by the verdict of the jury these matters are not now important.

In the year 1920 the books of the Portland branch of the General Cigar Company failed to balance but this

was assumed to be a stock leakage and no suspicion was directed against Turrell or any other office employee. The books were audited and stock checks made at considerable expense but the shortage was not found. On December 31, 1920, Turrell was discharged on account of his work becoming unsatisfactory, but he stayed on for the month of January, 1921, to assist in auditing the books. Since the shortage was not discovered a detective agency was employed and that company found that Turrell had made large deposits in the United States National Bank the source of which could not be satisfactorily explained, and the only explanation developed proved to be false. Later plaintiff's San Francisco office, which was the auditing center for plaintiff's branches on the Pacific Coast, discovered cancelled checks drawn by the Portland office payable to cash and it appearing that similar amounts had been deposited to Turrell's account in another Portland bank contemporaneously therewith it was believed that Turrell had been guilty of embezzlement. This information was developed on May 26th or May 27th, 1921, and at that time plaintiff had no information as to checks which had been transmitted to the Portland branch from other branches specially endorsed and cashed by Turrell, but their information was only as to those checks which Turrell had drawn to cash and cashed at defendant bank. Turrell was indicted and apprehended and steps were taken to attach all properties owned by him. From Turrell's confession and from other sources it was developed that Turrell had accomplished his embezzle-

ments in the manner described in plaintiff's complaint by the conversion of out of town checks, as well as by the cashing of checks drawn on the First National Bank payable to cash. As soon as a complete statement was developed of the embezzlements, a matter in which plaintiff was delayed by reason of the loss of its records and deposit slips by fire occurring in plaintiff's place of business on December 3, 1920, the bank was notified on July 20, 1921, of the embezzlements and the manner in which they were accomplished, and that the plaintiff demanded payment of the sums concerned in the complaint from defendant. It appeared from the testimony that the checks were drawn and endorsed as alleged in the complaint, and that they were cashed by the defendant bank in the manner therein described, which bank received reimbursement therefor from the drawee banks without paying or crediting plaintiff for the amounts received.

It appeared that plaintiff's branches exchanged statements but that Turrell falsified or suppressed such statements so that the embezzlements were concealed from the Portland branch and from the other branches, and it was this manipulation by Turrell that prevented discovery of Turrell's practice of cashing the checks. It appeared from the testimony that statements were rendered monthly with vouchers by the defendant bank to plaintiff and from the banks in Spokane and Seattle to plaintiff's branches in those cities.

In addition to the above testimony plaintiff offered testimony to show that its business in the various cities

were conducted as separate branches and in fact as separate businesses. There was also conflicting evidence as to the practice of banks in cashing checks drawn or endorsed payable to the bank.

In summary it may be said that the evidence adduced at the trial tended to support all the allegations of the complaint and also there was evidence both in support and denial of the defendant's first, second and third affirmative defenses.

Upon the cause being submitted to the jury a verdict was rendered for the defendant. The rulings of the court complained of as error by plaintiff were made in overruling plaintiff's demurrer to defendant's third affirmative answer and in instructing the jury.

A motion for new trial (153) was denied by the trial court, and the ruling is alleged to constitute error.

SPECIFICATION OF ERRORS

The specification of errors will be stated in the order in which they will be taken up in the argument and the various assignments of error grouped thereunder.

1. The Court erred in instructing the jury that the burden of proof lay with the plaintiff to show by the weight of the testimony that the defendant bank paid out the money on the checks to Turrell without authority from the plaintiff and in failing to instruct the jury that the burden of proof was upon the defendant to show that Turrell had authority from plaintiff to receive the money paid him.

Exception No. 6 (111), Assignment No. 7 (140).

Exception No. 11 (117), Assignment No. 12 (145).

2. The court erred in instructing the jury that if they believed that the plaintiff received monthly statements from defendant bank and from the drawee banks and failed to advise defendant within a reasonable time of the irregularities which a comparison of those statements would have revealed, that it is estopped to assert liability on the part of defendant for moneys paid by it to Turrell.

Exception No. 3 (108), Assignment No. 4 (136).

See instructions in full (102).

3. The court erred in instructing the jury that if they believed that a reasonably careful examination of the monthly statements rendered, and cancelled vouchers returned to the plaintiff by the defendant and the drawee banks, would have disclosed to the plaintiff that the amounts for which the checks were drawn had not been credited plaintiff's account, and that the plaintiff made no objection within a reasonable time to the cashing of these checks, that their verdict should be for the defendant.

Exception No. 4 (108), Assignment No. 5 (137)

Exception No. 5 (108), Assignment No. 6 (137)

Exception No. 14 (120), Assignment No. 15
(149)

See instructions in full (103).

4. The court erred in holding that if the plaintiff did not advise the defendant promptly of Turrell's fraud upon learning of that fact that the defendant would be relieved of liability especially in view of the

fact that no evidence was shown as to any damage suffered by plaintiff by reason of the delay, if any, and in view of the fact that it affirmatively appeared that plaintiff recouped so far as possible by prompt action from the embezzler Turrell, and held said sums subject to the participation therein of defendant.

Assignment No. 1

(128)

Exception No. 15 (122), Assignment No. 16

(150)

Exception No. 16 (123), Assignment No. 17

(151)

ARGUMENT

THE PLAINTIFF'S CASE

The right of the plaintiff to recover from the defendant on the facts set forth in its complaint was presented to the court below on demurrer to plaintiff's complaint. The court overruled the demurrer and rendered the opinion which appears on page 29 of the Transcript. Since this ruling was favorable to the plaintiff it is not, of course, included in the assignments of error. We believe, however, that it will be helpful to this court in considering the assignments of error that are made to give consideration to the principles and authorities sustaining the plaintiff's right to recover on the facts stated in its complaint.

It will be observed that the action is brought by the drawer and the payee of checks payable to order. These checks had been specially endorsed by affixing of rub-

ber stamp endorsements to the defendant bank plaintiff's depository. They were thereafter converted by Turrell and when presented to the defendant bank it cashed same paying the money to Turrell. The defendant bank, in the regular course of business, presented the checks to the drawee bank which bank, without question, paid them to the defendant, the special endorsee in possession of the checks.

Accepting these facts as true it is apparent that the defendant bank received possession of the checks from a thief and could obtain no better title than the thief had to them. It is well established that the fact that an individual or bank may be named as a special endorsee or as the payee of a check does not justify that bank or person in cashing the check when presented by one not the drawer or endorser thereof. 3 R. C. L. 981; Bausman vs. Kelly, 38 Minn. 197, 36 N. W. 333; Camp vs. Sturdevant, 16 Neb. 693, 21 N. W. 449; cases collected in 31 L. R. A. N. S. 614, and 1918 B., L. R. A. 576. The reason for this is clear. The person presenting the check is not and does not appear to be the holder thereof and the special endorsee or payee to whom it is presented can only become the holder thereof upon there being a delivery from the drawer or holder. The drawee is not justified in assuming that the person in possession has the authority to make that delivery by reason of the mere fact that he is in possession of the instrument.

The principal contention of the defendant on the demurrer was based upon the fact that the plaintiff was

both the drawer and the payee of the checks and it was argued that by reason of the action of the bank in converting the checks and receiving payment from the drawee banks the plaintiff was not damaged for the reason that the checks could not properly have been charged against plaintiff by the drawee banks. In answer to this argument plaintiff urged, first, that the drawee banks were within their rights in charging plaintiff's accounts with the amounts of the checks concerned and consequently that the funds held by the plaintiff in the drawee banks were diminished by reason of the converting of the checks by the defendant. See cases hereinafter cited. Second, that even if the drawee banks had not been within their rights in cashing the checks it was competent for the plaintiff to ratify the payment and charge the party who caused the wrongful payment to be made. See *Fowler vs. Bowers Savings Bank*, 113 N. Y. 350; 21 N. E. 172. The court below accepted the first answer of plaintiff to defendant's argument and it was unnecessary for it to consider the second answer presented. We believe that this court will have no hesitancy in following this ruling.

A drawee bank is protected in paying a check whenever it is presented by an endorsee or an apparent endorsee. Thus where a check has been endorsed in blank any person who presents it to the bank, although a thief, may be presumed by the drawee bank to be entitled to receive payment. 2 *Daniels Negotiable Instruments* 6th Ed. Sec. 1230. The drawee bank is not justified in making this payment where there has been

a forged endorsement. In the instant case the endorsement was not forged but a valid one and when the check was presented by the person who was the special endorsee of the check there was nothing that could put the drawee bank upon suspicion and it was entitled to make the payment to the defendant bank as it did. Indeed the plaintiff's action against the defendant is supported by three precedents precisely in point. *Sims vs. United States Trust Company*, 103 N. Y. 472; 9 N. E. 605; *Bowles Co. vs. Clark*, 59 Wash. 336; 109 Pac. 812. *Bjorga vs. First National Bank*, 127 Minn. 105; 149 N. W. 3. The New York case cited is typical of these cases. The plaintiff in that case drew a check on B. Bank making it payable to the defendant bank. The plaintiff then entrusted the check to one C. with instructions to deliver the check to the defendant bank for purposes of deposit in that bank. C. took the check to the defendant bank and the bank, at his request, delivered to C. a certificate of deposit payable to himself, which certificate he subsequently cashed and converted to his own use. The check was presented by the defendant bank to B. bank by which it was paid to defendant. It was held that the plaintiff could recover from the defendant in an action for money had and received. A decision of contrary inference, *Tibby Bros. Glass Company vs. Farmers and Mechanics Bank*, 220 Pa. 1, 69 Atl. 280, is criticised in 15 L. R. A. N. S. 519.

We believe that this court will have no hesitancy as accepting as correct the ruling of the court below in regard to the sufficiency of the complaint if indeed any

criticism is made of that ruling by the defendant in error.

ERRORS MADE BY COURT BELOW

The issues tried before the jury in the court below were those made by the three affirmative answers. The first issue was whether Neil W. Turrell had actual or apparent authority to cash checks received by the plaintiff from its out of town branches. The second issue was whether the plaintiff was estopped by reason of the receiving of monthly statements and vouchers from the various banks or by reason of a failure to exercise due care in the conduct of its business in relation to the supervision of Turrell's work from asserting claim against the bank on account of (a) all the checks cashed by defendant involved in this action, or (b) the checks cashed by defendant after the time when by reason of said monthly statements or by reason of proper supervision the defalcations should have been discovered. The third issue was whether the plaintiff exercised reasonable diligence and promptness in notifying the defendant after discovering Turrell's fraud and if not what consequences followed by reason of that failure. In a word, the issues were (1) authority, (2) estoppel by accounts stated, or negligence, and (3) release by suppression of facts.

We believe that a consideration of the record in this case will convince the court that error extremely prejudicial to the plaintiff was made by the court below on each of these three main issues in the action. The

errors complained of in the specification of errors are not technical. On the other hand, by reason of them, a verdict was practically *directed* for the defendant when the plaintiff was entitled to have the issues presented determined by the jury.

We have not in the specification of errors in this brief included all of the exceptions taken as shown by the bill of exceptions, nor all of the assignments of error included in the Transcript of Record. In our opinion forcible arguments could be adduced in support of certain of the assignments and exceptions omitted from the specifications of errors, but we have chosen to include in the specification of errors and to make the subject of argument in this brief only those rulings which, being made the subject of objection and exception, are so clearly in error and so highly prejudicial to the plaintiff as to, in our opinion, undoubtedly require the reversal of the judgment below and the awarding to the plaintiff of a new and fairer trial.

BURDEN OF PROOF TO SHOW AUTHORITY

The court below instructed the jury:

“Now, gentlemen of the jury, I instruct you further that the burden of proof lies with the plaintiff to show that the defendant bank paid out money without authority from the plaintiff, either real or apparent. * * * The burden of proof, gentlemen, is simply the weight of the testimony. It

is such weight that would carry the scales of justice down upon one side or the other; and in considering the question as to whether these parties have made out their case by the burden of proof as I have mentioned to you, you will determine whether the weight of testimony is upon that side." (105.)

To which instruction exception was duly taken (111), and was assigned as error (140), and is mentioned *supra* as plaintiff's first specification of error. Instruction, placing the burden of proof to show authority in Turrell to receive payment on defendant bank was refused and exception was duly taken (117). Such refusal is assigned by the 12th Assignment of Error (145).

The rule of procedure is accepted universally to be, that the party who relies upon the existence of an authority, whether express or implied, actual or apparent, limited or general, has the burden of proof to establish by the weight and preponderance of the evidence the existence of that authority.

Of this the following cases are illustrative:

In *Smith vs. Campbell*, 85 Or. 423, it is said:

"Counsel for defendant correctly submits that where a third party is sought to be held upon a contract alleged to have been executed by an agent the party seeking to enforce the contract must establish the alleged agency (citing cases); that an agent's authority cannot be proved by his own statements that he is such an agent and before the acts of the agent can be shown against the principal

the agency must be shown (citing cases)."

In the recent Oregon case of *Jones vs. Marshall-Wells Company*, 208 Pac. 768, the above citation was cited and approved.

In *Sears vs. Daly*, 43 Or. 356, it was said:

"The question upon the trial of this branch of the case was whether the act of the party signing the note, if not Mrs. Daly, was binding on her either because she authorized or subsequently ratified it, and the burden of proof was upon the plaintiff to establish the agency or ratification." (This case was reversed because the burden of proof had been improperly assigned in the court below.)

In *Rumble vs. Cummings*, 52 Or. 208, the language of the court is:

"When a third party relies upon a contract which he effected with a person who claims to be an agent, he must, when the agency is disputed, prove either, first, that the individual, who thus undertook to transact with him some business for another, was expressly empowered by the latter to make agreements for him, and that the terms of the contract, which are sought to be established, are within the scope of the authority conferred; or, second, that the principal knowingly permitted the agent to assume that he had liberty to make agreements, or that he held the agent out to the public, in other instances, as possessing requisite power to embrace the execution of the contract involved, in making which the third party had reason to believe

and did believe that the agent had the necessary authority; or, third, that the principal, with full knowledge of the agent's arrogation of power in making a contract on his behalf, accepted the fruits thereof, or with like knowledge, otherwise ratified the unauthorized agreement."

Schutz vs. Jordon, 141 U. S. 213, 35 L. Ed. 705 is also in point.

The rule placing the burden of proof of authority upon the parties who rely upon it, extends equally to the case where the extent of an agent's authority is at issue. as to the case where the existence of an agency is the issue. To this point Schutz vs. Jordon, *supra*, may be quoted as follows:

"It was a denial, it denied the sale; and the burden of proving the sale was on the plaintiffs, and rested with them until the close of the case. It would not establish a purchase by the defendants, that an agent of theirs had made a contract. The plaintiffs must go further, and prove that such agent had authority to make the contract; not to make contracts generally, but to make the contract which in fact was made. A party who seeks to charge a principal for the contracts made by his agent must prove that agent's authority; and it is not for the principal to disprove it. The burden is on the plaintiff. The plaintiffs would not contend that they had made out a cause of action against the defendants, by proving that Hewes had made a purchase in their name. Of course they

must go further and prove that he had authority to purchase; and they must also prove that the purchase was within the authority conferred. Authority to buy one class of goods would not be authority to buy another and entirely different class. Authority to buy in the usual course of business would not be authority to buy outside of that course of business. And when they rely upon contracts made with Hewes the burden is on them, and continues on them, to establish the contract which in fact was made, and that it was within the scope of his authority as agent."

Counsel for respondent may ingeniously attempt to defend the instruction given by attempting to confuse the burden of going forward with testimony with the burden of establishing an issue by the preponderance of the evidence. We are aware that there are authorities that loosely state that upon the establishment of a general agency the burden of then showing a limitation of that authority passes to the agent's principal, but the expression of these authorities can only be sustained, if they can be sustained at all, by assuming that they treat of the burden of going forward with the testimony and not with the burden of proving the issue by the weight of the evidence.

In the first place even these authorities would not justify the instructions given because, under those authorities, there would have had to have been submitted to the jury the question whether a general agency existed upon which undoubtedly the defendant, as relying

upon the agency, would have the burden of proof. No such instructions were given by the court. Until that general agency had been determined there would be no presumption of the receipt of payment by Turrell being within his authority.

But even if this preliminary instruction had been given, the instruction complained of would have been in error because it places the burden of proof to establish by the weight of the testimony the fact of there being no agency upon the plaintiff, the alleged principal. And it has been held by the Supreme Court of Oregon and in the Federal courts that the burden of proof in the sense of establishing a fact by the weight of the testimony *never shifts* throughout a trial. Instead, if the establishment of a fact is necessary to a party's case he must establish that fact by the weight of the testimony. He may succeed in making a *prima-facie* case which throws the burden of rebuttal upon the other party, if the other party desires to rebut the testimony offered, but he must in any event meet the burden of convincing the jury by the preponderance of the evidence of the fact which he has undertaken to establish.

In *Hanson vs. O. W. R. & N. Co.* 97 Or. 190, the matter of the burden of proof in the sense of the burden to prove by the weight of the testimony a given proposition, was given attention in a learned opinion by Mr. Justice Harris of that court. The case involved a loss by a bailee. In the syllabus it is said:

“The phrase ‘burden of proof’ has two meanings, one to express the idea that a named litigant

must, in the end, establish a given proposition in order to succeed; the other to express the idea that at a given stage in the trial it becomes the duty of a certain one of the parties to go forward with the evidence.

“When the words ‘burden of proof’ are used to express the idea that a named litigant must establish a given proposition then it is not accurate to say that the ‘burden of proof’ shifts at any stage of the trial.”

It was held that the burden of proof was upon a bailor to establish, by the weight of the testimony, that goods were injured through the negligence of the bailee in the sense that he had the burden of showing by the weight of the testimony that the injury occurred through the bailee’s fault, and that the burden in that sense of establishing by the weight of the testimony the fact of negligence never shifted throughout the trial and a contrary instruction caused a reversal of the judgment below.

A similar rule is stated in *Cohen Company vs. Houck Mfg. Co.*, C. C. A. 2nd Circuit, 249 Fed. 285, as follows:

“The burden of proof as fixed by the examination of the pleadings does not change although during the progress of the trial the burden of going forward with the evidence to rebut a *prima facie* may shift.”

In the case at bar the trial judge instructed the jury that the burden of proof to establish that Turrell was

not its agent was upon the plaintiff, and he defined that burden of proof as being the duty of establishing the fact by the weight of the testimony. That instruction cannot be defended by the contention that a *prima facie* case of agency had been made because such a *prima facie* case would not have shifted the burden of proof in the sense in which it was defined by the court. The burden of proof in the sense defined by the court was either upon the plaintiff or upon the defendant throughout the case. It could not shift from one party to the other during the course of the trial. We submit that the above authorities establish that such burden of proof was upon the defendant which relied upon the agency to justify its payment and that the court was mistaken in the law in placing the burden upon the plaintiff to disprove the fact of the existence of that authority.

The plaintiff alleged in its complaint that N. W. Turrell wrongfully, without authority from plaintiff, took and converted to his own use said check, endorsed as above stated, and wrongfully, without authority from plaintiff, transferred said check to the defendant. The point may be made by the defendant that by the allegation of Turrell's lack of authority that plaintiff assumed the burden of proving the fact alleged. But the law is otherwise. The fact that in a complaint an unnecessary allegation is pleaded does not require the plaintiff to sustain that allegation at the trial by a preponderance of the evidence. The test is not what is pleaded but what *must* be pleaded to establish the case. The plaintiff would have made its case by pleading ownership of

the check and that defendant had wrongfully presented said check to the drawee bank, obtained payment thereof and failed to account for the proceeds. It would then have become incumbent upon the defendant to plead as a defense the alleged fact that the agent had authority to transfer the check and receive payment therefor. Indeed in this case the defendant accepted this view and pleaded affirmatively the authority of Turrell.

The authorities clearly establish the rules above stated. In 10 R. C. L. 900 the text is:

“The plaintiff is obligated to prove only the facts necessary to his cause of action. If he alleges some fact not necessary thereto but which is in effect a traverse of some fact which might have been alleged as a defense to the action, and the defendant denies such allegation, this does not change the burden of proof, nor require the plaintiff to introduce any evidence on that subject until the defendant has produced evidence thereon which makes a rebuttal necessary.”

In *Bell vs. Pleasant*, 145 Calif. 410, 416, 78 Pac. 957, the plaintiff had acquired title to certain property under a prior unrecorded deed. The defendant had received a subsequent deed which had been recorded. Both deeds were from the same grantor. The plaintiff brought action against the defendant to have the subsequent deed cancelled and alleged in the complaint that defendant, at the time of receiving this conveyance, had notice of the prior deed. No evidence was introduced at the trial by either party on the subject of notice and

the court found for the defendant. This was reversed on appeal. It was held that as a matter of law the burden of proof was on the defendant to show that he took without notice and the court further said:

“Defendant claims that plaintiff must prove that defendant had notice because it is one of the facts alleged in her complaint and denied in the answer. This, however, is not the test. The plaintiff was obliged to prove only those facts which were necessary to constitute her cause of action. If she has alleged some fact not necessary to her case but which is in effect a traverse of some fact which might have been alleged in defense to her action, and the defendant denies such allegation, this does not change the burden of proof nor require the plaintiff to introduce any evidence upon that subject until the defendant has produced evidence thereon which makes rebuttal evidence on her part necessary. She is not obliged thus to anticipate a possible defense.”

In *Stephens vs. Philadelphia Fire Association*, 139 Mo. App. 369, 373, 123 S. W. 63, it was held that where the settled doctrine of law placed the proof of a fact upon the defendant insurance company that the burden of proof was not changed where the other party had pleaded the negative in its complaint. The court answered the contention of the insurance company as follows:

“This is an erroneous construction of the law in reference to the burden of proof and proceeds

upon the mistaken theory that the form of pleading governs as to the burden of proof, and that by changing the form of the pleading the burden of proof can be shifted. Such is not the law. Where the burden of proof lies upon one party it cannot be thrown upon the other party by the form of the pleading.”

In 22 C. J. 71 the text is:

“A party is not required to prove negative allegations which are merely necessary as pleadings but constitute no part of his case.”

Further authorities in accordance with those quoted on this point are:

Figland vs. Jones, 39 S. D. 40;

State vs. Melton, 8 Mo. 417;

Melone vs. Ruffino, 129 Calif. 514, 62 Pac. 93, 95.

The rule of these cases is in fact embodied in the statutes of Oregon, Section 726, Oregon Laws, as follows:

“Each party shall prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded. * * *

The burden of proof having been improperly placed upon the plaintiff instead of the defendant in regard to one of the most important issues in the case it follows that such a ruling was highly prejudicial to the plaintiff

and requires the reversal of the judgment below and the awarding of a new trial. Invariably where the burden of proof has been improperly assigned the error is considered so prejudicial as to demand a reversal. The compiler of *Corpus Juris* in 22 C. J. 70 sums up the expressions of the many authorities cited as follows:

“The rule as to the burden of proof is important and indispensable in the administration of justice, and constitutes a substantial right of the party upon whose adversary the burden rests. It should, therefore, be jealously guarded and rigidly enforced by the courts.”

It is seldom that in a matter of this kind authorities can be found presenting precisely the facts and legal principles involved in the case under consideration. So far as the question of agency is concerned, however, we find one case in which the facts were very similar and the precise ruling here complained of was presented to the Appellate Court for review. The decision referred to is that in *Dispatch Printing Company vs. National Bank of Commerce*, 109 Minn. 440, 124 N. W. 236. The plaintiff, the Dispatch Printing Company, had employed one Sturm to act as its Minneapolis manager and he had power to solicit business and obtain collections. Checks which he received covering collections he deposited in a bank, not the defendant bank, in his own name and this bank in regular course presented them to the defendant bank which was the drawee bank named in the checks and the defendant paid the amount of these checks in regular course. The plaintiff brought

an action against the defendant bank alleging that Sturm endorsed the checks in question without any authority and that the deposit in the bank was without plaintiff's authority or consent. (It will be observed that in this case the validity of the endorsement was disputed which justified an action against the drawee bank. In the instant case the validity of the endorsement was admitted and consequently the plaintiff was without remedy against the drawee bank.) An answer put in issue the allegations of the complaint and authority in Sturm to make the endorsements was pleaded as a first affirmative defense and an estoppel against the plaintiff as a second defense. The trial court instructed the jury that the burden was upon the plaintiff to show lack of authority in Sturm. A verdict and judgment was rendered for the defendant and on appeal the judgment was reversed because of the error in assigning the burden of proof to the plaintiff. The decision on this point is as follows:

“Error is also assigned to those portions of the instructions submitting to the jury the question of Sturm's actual or apparent authority to indorse the name of plaintiff upon the checks and to receive the money thereon as its agent. The court, as introductory to its general instructions in this respect, stated to the jury that the burden was upon plaintiff to prove by a fair preponderance of the evidence that Sturm had no actual authority to do the thing complained of. We are of opinion that the court erred in this instruction. It is ele-

mentary that the power of an agent to bind his principal rests entirely upon the authority conferred upon him. Without such authority, for which the principal himself becomes, by act or conduct, responsible, the agent can bind himself only. 'Every person, therefore, who undertakes to deal with an alleged agent, is put upon inquiry, and must discover at his peril that such pretended agent has authority, that it is in its nature and extent sufficient to permit him to do the proposed act, and that its source can be traced to the will of the alleged principal.' 31 Cyc. 1322; *Ermentrout vs. Insurance Co.*, 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481. At the time the Germania Bank received the checks from Sturm it had knowledge that he was the agent of plaintiff, the checks were payable to plaintiff, and were indorsed by Sturm as its manager. He was not a general agent, with unlimited or unrestricted power, but instead was clothed with special or limited authority only, that of soliciting advertising and collecting accounts sent him by the home office of plaintiff. This did not invest him by implication with power or authority to indorse or negotiate for plaintiff commercial paper, and the bank was under special duty to make inquiry respecting his authority to indorse these checks. *Deering v. Kelso*, 74 Minn. 41, 76 N. W. 792, 73 Am. St. Rep. 324; *Jackson Paper Co. v. Bank*, 199 Ill. 151, 65 N. E. 136, 59 L. R. A. 657, 93 Am. St.

Rep. 113; *Bank v. Nye*, 37 Ind. App. 464, 77 N. E. 295, 117 Am. St. Rep. 333; *Seattle Shoe Co. v. Packard*, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064; *N. Y. Iron Mine v. Bank*, 39 Mich. 644; *Edwards v. Thomas*, 2 Mo. App. 282. If the bank relied upon actual authority in *Sturm* to so act, the burden was upon it to establish the fact. 31 Cyc. 1643; *Nicholson v. Pease*, 61 Vt. 534, 17 Atl. 720; *Whitaker v. Ballard*, 178 Mass. 584, 60 N. E. 379; *Bank v. Tuck*, 101 Ga. 104, 28 S. E. 168; 1 *Clark & Skyles, Agency*, 506. This rule is supported by the uniform trend of authorities (2 *Ency. L. & P.* 831), and was in no way changed in the case at bar by the fact that the plaintiff in its case in chief offered evidence of the general authority and employment of *Sturm*. The court was in error, therefore, in giving this instruction, and that it was prejudicial will admit of no discussion. It left the impression upon the minds of the jury that actual authority existed which plaintiff was required to overcome by a fair preponderance of the evidence, and nothing was said later along in the instructions to overcome the impression so created."

ESTOPPEL BY REASON OF RETURN OF VOUCHERS

Under this general heading consideration will be given to plaintiff's second and third specifications of error.

The instructions of the court dealing with the effect

to be accorded the return of vouchers by the defendant bank to the plaintiff and to the return of vouchers from the Spokane and Eastern Trust Company and the Union National Bank to plaintiff appear in the Transcript beginning at the top of page 102 and ending with the last full paragraph on page 104.

The first paragraph states that there is a duty resting upon the depositor to examine the periodical statements of a bank and report without unreasonable delay errors discovered, and that if he fails to do so the bank may regard such failure as an admission that the entries are correct. With this instruction we have no particular quarrel although we do not deem it applicable to this case.

The next two paragraphs of the instructions we quote:

“It is alleged, among other things, that at all times from July 23, 1919, to December 15th of the same year, the plaintiff, in addition to the three accounts carried in the defendant bank, carried accounts in the Spokane & Eastern Trust Company, of Spokane, and the Union National Bank, of Seattle, and that each of these banks, including the defendant bank, rendered a monthly statement to plaintiff of its account therewith; that thereby the plaintiff was advised as to the exact condition of its accounts in each of these banks, respectively, touching the amounts of money drawn from the bank by Turrell, but made no objection thereto, and gave

the bank no information touching any irregularity affecting such accounts.

“If you find from the evidence in the case that such were the facts, and that the plaintiff was so advised and failed, within a reasonable time, to advise the defendant bank of such irregularities, then the plaintiff would be estopped now to assert that defendant was liable for its acts in paying the money over to Turrell in pursuance of his request or demand, and your verdict should be for the defendant.”

The jury was instructed by the above that if the plaintiff was informed by reason of the statements rendered by the defendant bank in connection with the statements rendered by the drawee banks of the condition of its accounts in each of these banks touching the amounts of money drawn from the bank by Turrell, but failed within a reasonable time to advise the defendant of the irregularities, then the plaintiff would be estopped from asserting liability of the defendant to it. Analyzing this instruction it appears that it amounts to practically a directed verdict against the plaintiff. Of course the jury found that the plaintiff received statements from the various banks and, of course, those statements, if compared, would show the amounts of money taken and paid in cash by the defendant bank to Turrell. The instruction assumes that advice of the various accounts to the plaintiff was advice to it of the irregularities fixing a duty upon the plaintiff to defendant to compare the statements and vouchers sent by defendant to plain-

tiff with vouchers and statements sent from different sources to other branches of plaintiff in distant cities. We believe that the court was unwarranted in making the assumption that it did. We believe further that on the evidence presented that a jury would not have been justified in making a finding to that effect. This instruction as to the effect of the return of vouchers from the defendant bank, taken in connection with the return of vouchers from the drawee banks, is made the subject of the third exception, the fourth assignment of error, and the second specification of error.

No exception has been taken to the instructions in regard to the knowledge which would be imputed to a depositor who permits his agent to verify bank statements.

By the next two paragraphs the court instructed the jury that if they believed from the evidence that a reasonably careful examination of the monthly statements rendered and cancelled vouchers returned to the plaintiff by the defendant and by the drawee banks would have disclosed to plaintiff that the checks which Turrell had cashed had not been credited to the plaintiff's account by the defendant bank, and that no objections had been made by plaintiff to defendant as to the cashing of the checks, that they should find for the defendant. This instruction is made the subject of the Fourth and Fifth Exceptions, the Fifth and Sixth Assignments of Error, and the Third specification of error. This instruction is, we think, although that is not the cause of our complaint, inconsistent with the instruction just considered

involved in the second specification of error. The inconsistency is that by the latter instruction it is left to the jury to determine whether, in the exercise of due diligence by the plaintiff, the irregularities attributable to Turrell's fraud would have been discovered through a comparison of the various bank statements whereas in the former instruction it was assumed that these irregularities should have been discovered merely because of the receipt of the statements.

The plaintiff in error urges that these instructions are erroneous in the following respects: First, the court either assumes or permits the jury to find that the plaintiff, by receiving statements from the defendant bank of its account in that bank and by failing to detect Turrell's fraud which could not be discovered by the most careful examination of the statements rendered by the defendant, and could only be revealed by an investigation outside of those statements, and by comparison with the statements from the drawee banks, was estopped by reason of negligence from asserting claim against the defendant, both on account of checks cashed before the rendering of statements as well as checks cashed thereafter. Second, the jury was instructed that failure by the plaintiff to exercise due care in checking the statements and vouchers would absolve the defendant from liability regardless of whether it was culpable or not in originally cashing the checks. Third, the plaintiff is held estopped to recover from defendant by reason of a lack of diligence on its part in detecting and advising of the irregularities even though the defendant bank

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suffered no damage by reason of that delay. We will take up these matters in which we believe the court erred in their order.

It is important to bear in mind the exact situation of the parties. It is a fact in this case that the plaintiff was a depositor in the defendant bank. As we see it, however, this is not an essential or distinguishing fact in the case. The check which was cashed by the defendant for Turrell never became a subject of entry in the accounts of plaintiff with defendant. The transactions involved in this cause are not transactions between depositor and bank, and it is but a coincidence that that relation existed between the parties. Let us suppose that the special endorsement had not been to the First National Bank but had been to "any bank or bankers," and Turrell had taken the check to another bank in the city of Portland where he was known, stated that he wished to receive the money for that check, and that bank had cashed it and transmitted in regular course to the drawee bank and received payment. If action was brought against that bank for money had and received or for conversion of the check it would be unable to shield itself by claiming an account stated between the drawee bank and the plaintiff, or between plaintiff's bank of deposit in Portland and plaintiff. The reason would be that the bank that had cashed the check in the suppositious case would have never rendered an account to the plaintiff in regard to the cashed check which would have required the plaintiff to take action to determine its correctness. With this analogy in mind

it would seem apparent that the defendant bank in this case had never rendered to plaintiff an account in regard to the checks cashed for Turrell, and that no account having been rendered as to the transactions here concerned there was not created on the part of plaintiff an obligation to check the correctness of an account that was not rendered.

It is not to be supposed that where one party has converted the property of another, or wrongfully paid out his money, that the injured party will be defeated in its action merely because he has failed to exercise the care which a reasonably prudent man would have exercised to discover the conversion or fraud. In 26 R. C. L. 1141, the text is:

“Clearly the negligence, if such it may be called, of a party to proceed against one who is known to have taken and used his property unlawfully, does not deprive him of the right to bring trover unless the statute of limitations interposes.”

The duty of a depositor to examine the statement and vouchers sent him by a bank arises because the bank, at his request or in accordance with banking usages, has sent a statement purporting to cover the entries and deposits of the account and if that statement is not objected to the bank is justified in assuming the statement correct, and it is incumbent upon the depositors to make a reasonable examination of the statement and the supporting vouchers to determine its correctness. The doctrine is stated in the United States Supreme Court in *Leather Mfg. National Bank vs. Morgan*, 117 U. S. 96, as follows:

ments of account, or the lists made up by Pinkham for deposit, or the lists of deposit rendered by the bank, of any further transactions between the bank and the mill company. Unlike some of the cases of which note is taken here, where the balances on the stubs of the checks issued were forced and an inspection would have disclosed the irregularity, the bank statements, in comparison with the checkbook and cashbook, exhibit a businesslike and satisfactory record, from which no suspicion of irregularity could arise.

“But it is strenuously urged that, as the Mandan Mercantile Company received a credit on the 5th of April, 1907, and the item went into the cash account of the mill company, it being an item of payment which in the usual course of business should have passed to the credit of the mill company in the bank, the mill company should have taken note of the fact, and that, by pursuing the further inquiry which was subsequently pursued, and sending out to customers for their statements of account, the peculations of Pinkham would have been disclosed, and thus the mill company would have been enabled to protect the bank from further cash payments, and ought to have done so. *We think, however, the duty of a depositor towards his bank in relation to the examination of the bank statements, made in connection with its writing up and balancing the depositor's passbook, does not reach to that extremity. The statements, as we have shown, are*

rendered for the purpose of advising the depositor of the state of his account. If those statements tally with the deposit slips made up by the depositor and the checks drawn against the bank, and if the balances agree one with the other, the depositor is not obliged to look further, nor to bear in mind some irregularity that may appear elsewhere in his general books, although a searching inquiry might lead to a discovery of the fraud. The mill company was unable to ascertain what had happened, until it sent out to its customers for statements of their accounts and called in experts to determine the condition of its books. It was then discovered that the Mandan Mercantile Company credit was given on April 5th, which gave a clue to the line of inquiry, and led to a discovery of the fact that that item did not appear in the bank deposit, as it should have done; and it was found that, if the items in the mill company's cash account had been checked with the deposit account, it would have shown that this item had not been deposited, although it is probable the cash had been drawn from the bank, in this particular instance, and put in the cash drawer of the mill company. The inquiry which the defendant would have had the plaintiff pursue to discover the fraud is collateral to an examination of the pass-book and the record of checks drawn against the bank account, and it does not seem to us that the plaintiff was guilty of such negligence in relation thereto as that the question should have been sub-

mitted to the jury. We find no error, therefore, in the court's refusal to give the instructions requested by plaintiff."

The only variation in facts between the case last cited and the instant case is that in that case it was necessary to refer to the statements of customers to detect the embezzlement while in the instant case it was necessary to refer to the statements of the drawee banks, but that variation we submit does not serve to distinguish the cases. In both the statement of the defendant bank was not concerned with the transaction involved in the action. In both cases the fraudulent transaction could only be detected by a comparison of the statement rendered with other statements sent by other parties. If this case is affirmed the case of *National Bank of Commerce vs. Tacoma Mill Company, supra*, must be overruled.

We concede that the matter of the return of vouchers was a subject together within other facts to be considered by the jury in determining when, in the exercise of reasonable care, the practices of Turrell should have been discovered, and that when, in the exercise of reasonable care, the practices of Turrell should have been discovered, the plaintiff would be estopped from claiming recovery from defendant as to checks so cashed thereafter. This is the effect of the instruction appearing in the last full paragraph on page 101 of the Transcript. We deny, however, that under the authority of the case last cited there was any evidence to go to the jury in regard to an estoppel as to checks that had been

cashed prior to sending of statements and vouchers by defendant to plaintiff covering the deposits in the defendant bank and especially we deny the correctness of the instruction of the court complained of under the second specification of error which goes further and holds that as a matter of law the return of vouchers from defendant to plaintiff, together with the return of vouchers from the drawee banks to plaintiff, create an estoppel against the plaintiff's maintenance of action.

Even if the contentions that we have made were erroneous, and the court was correct in applying the doctrine of estoppel by sending of statements covering the deposit account of plaintiff in regard to a transaction which was not involved in that deposit account, yet the instructions as given would be clearly erroneous as not taking into account certain limitations of the rule of estoppel by the rendering of statements by bank to depositor clearly established by authority.

The first limitation referred to is that the doctrine of estoppel by reason of the failing to exercise reasonable care in the detection of fraud upon the return of statement and vouchers does not apply when the bank was negligent or culpable in the cashing of the checks. The doctrine of estoppel only applies in favor of the bank when it was innocent and blameless in the transaction.

The rule is well expressed in the head note in *National Dredging Company vs. Farmers Bank*, 6 Penne. (Del.) 580, 69 Atl. 607:

“Where a suit is brought by a depositor to re-

cover from the bank money deposited by him, which the bank has paid out otherwise than in conformity with his orders, and the bank sets up the defense that it is nevertheless entitled to charge the depositor with such payments because of the conduct of the depositor subsequent to such payment, the preliminary question to be determined is whether the bank was or was not guilty of negligence in making the payment. If it were negligent, if its officers be found to have failed to exercise due and reasonable care in detecting the forgery, or fraud, then the negligence of the depositor, by his failure to perform his duty in examining his pass book and vouchers with reasonable care and report to the bank within a reasonable time any errors or mistakes, would constitute no defense."

This limitation received the approval of the United States Supreme Court in the case of *Leather Manufacturers National Bank vs. Morgan*, 117 U. S. 96 at page 112, where it is said:

"Of course if the defendant's officers before paying the altered checks could by proper care and skill have detected the forgery then it cannot receive a credit for the amount of these checks even if the depositor omitted all examination of his account."

The rule was applied in *Manufacturers National Bank vs. Barnes*, 65 Ill. 69. In that case a depositor, being obliged to leave the city for a short time gave to a clerk a power of attorney authorizing him to draw

checks on the bank for fifteen days and lodged this power of attorney with the bank. After his return, and at the end of the fifteen days, the clerk continued to draw checks and the bank to pay them. It was held that this constituted negligence on the part of the bank, which could not be excused merely by the failure of the depositor to examine the return checks. This case was followed in *Merchants National Bank vs. Nichols and S. Co.* 223 Ill. 41, 79 N. E. 38. In that case a bank had paid an overdraft by an agent upon the account of his principal without ascertaining the authority of the agent. It was held that this was such negligence on the part of the bank that it could not assert an estoppel against the principal on account of his failure to examine the pass book and returned vouchers after the balancing of the account and recovery against the bank was allowed. Similar rulings were made in *Brixen vs. Deseret National Bank*, 5 Utah 504, 18 Pac. 43, and in *New York Produce Exchange Bank vs. Houston*, 95 C. C. A. 251, 169 Fed. 785. The authorities are collected on this point in note in *L. R. A.* 1915 D. at page 753, and in 13 *Rose's Notes* 325.

The Transcript reveals that there was evidence in this case which the jury might have believed to the effect that the defendant bank was negligent and culpable in cashing the checks for Turrell. It appears from page 86 of the Transcript that a witness stated that Mr. Jones, the vice-president of defendant bank, had said "that he thought it was a very . . . a peculiar thing that they had cashed these checks because they

had all been expressly ordered not to do that sort of thing." A witness for plaintiff testified that in the period of twenty-four years the plaintiff had never had checks cashed when stamped with the rubber stamp endorsement. Under the instructions given by the trial court the jury could have found that Turrell had no authority, actual or apparent, to receive moneys on these checks and that the bank was negligent in cashing them for him, but nevertheless if they found statements of account were rendered by defendant to plaintiff they could have found for the defendant on the ground that the plaintiff was estopped by reason of the return of those statements, yet, under the authorities above cited, no estoppel should have arisen against plaintiff where the defendant bank was itself negligent.

The court instructed the jury that the estoppel against plaintiff, by reason of failing to exercise due care in examination of vouchers, would arise regardless of whether the defendant bank was injured by reason of that negligence. We believe that the doctrine of estoppel should apply only in case and to the extent that the bank was injured by the failure to use due care in examination of vouchers by the depositor.

In this case no evidence was introduced by the defendant showing loss by it by reason of plaintiff's failure to promptly discover the fraud of Turrell in regard to the checks cashed before such fraud should have been discovered, and under the instructions given by the court it was not necessary for such loss to appear for the jury to find for the defendant on this issue. In Note 1915

D L. R. A. N. S. page 750, the Annotater states:

“Although the depositor has failed in the duty which rests upon him as to the examination of his account from the return of the pass book and cancelled checks, still he is entitled to recover from the bank money wrongfully paid out by it if it has suffered no damage from the depositor’s dereliction of duty.”

A leading case on this point is *Janin vs. London and S. F. Bank*, 92 Calif. 14 27 Pac. 1100. In that case the plaintiff was a depositor in the defendant bank and the defendant paid money on a forged check purporting to have been drawn by the plaintiff. One of the defenses of the bank was an alleged estoppel on account of plaintiff’s failure to notify the defendant of loss within a reasonable time after the return of statement and vouchers to it. Judgment was rendered for plaintiff and the court said:

“If plaintiff was negligent it was not shown that the defendant suffered any damage thereby and for that reason such negligence cannot be allowed as a defense to plaintiff’s right to recover in this action.”

The following cases are to the same effect: *Lieber vs. Fourth National Bank*, 137 Mo. App. 158, 117 S. W. 672; *Weinstein vs. National Bank*, 69 Tex. 38, 6 S. W. 171. It has been held in a number of cases that where a depositor has been derelict in his duty to examine an account as shown by pass book and vouchers, the bank is relieved of liability only to the extent to

which it has been damaged. *First National Bank vs. Allen*, 100 Ala. 476, 14 So. 335. *Critten vs. Chemical National Bank*, 171 N. Y. 219, 63 N. E. 969.

We were aware that counsel for defendant in error may cite cases which reach or appear to reach conclusions different from those contained in the cases just cited. Undoubtedly, however, the position for which we contend, namely, that estoppel will arise in favor of the bank only where negligence of the depositor in examining his account causes loss to the bank is sustained by the great majority of the decisions. The case of *Leather Manufacturers National Bank vs. Morgan*, *Supra*, is not in its holding contrary to the majority doctrine. In this case there was evidence tending to show negligence by the depositor in the examination of statements and vouchers, and that this negligence caused delay in discovering the forgeries committed and the prosecution of the guilty party. It was held under these facts that it was error to direct a verdict for the plaintiff depositor and against the defendant bank. The case holds, therefore, that the deprivation of an opportunity to proceed against the forger or thief is in itself a sufficient fact to take the case to the jury on the question of loss to the bank. It does not hold, certainly, as was held in this case and as the jury was told by the instructions of the court, that such delay is conclusive as to loss by the bank. This was the view taken of the decision in *Janin vs. London and S. F. Bank*, 92 Calif. 14, *Supra*, at page 26.

DELAY IN NOTIFYING BANK OF FRAUD AFTER KNOWLEDGE THEREOF

Upon demurrer to the third affirmative answer the court below was called upon to decide as to whether the fact of delay for an unreasonable time after discovering Turrell's fraud in notifying the defendant bank thereof would estop the plaintiff from recovering in this action. The court held that on these facts an estoppel would arise against the plaintiff. By the 16th Assignment of Error (150) it appears that the plaintiff in error requested instructions that as it affirmatively appeared in the case that all of Turrell's property had been attached by the General Cigar Compay and was held subject to the decree of court, that no harm resulted to defendant bank on account of any delay that might have existed in notifying the bank of claim, and that consequently the jury should ignore the 3rd affirmative defense. This instruction was refused and the jury was instructed (104) that if they found the allegations of the 3rd affirmative defense to be true that they should find for the defendant. The rulings in these respects are assigned as error by the Fourth Specification of Error in this brief.

The matters involved in the Fourth Specification of Error are so interwoven with the matters involved in the Second and Third Specifications of Error that they do not readily admit of separate treatment. Indeed, it is probably true that the third affirmative answer adds nothing to the second affirmative answer. It would seem immaterial whether the negligence of the plaintiff,

assigned by defendant, existed in the failure promptly to discover the fraud or in the failure promptly to notify of the fraud when discovered. See comment on this in note 20 L. R. A. N. S. 82.

Plaintiff in Error urges that the ruling on demurrer and the instructions of the court were in error on this point because first, they assume a duty to notify the bank, and secondly, because of the ruling that an estoppel would arise regardless of whether loss resulted to the bank.

It is unnecessary to repeat the argument made on the first mentioned point under the last heading. The duty to exercise due care in discovering a conversion of one's property or in notifying a converter, no matter how innocent of that conversion, so that he may exercise a remedy against some other party who may be responsible to him does not exist unless it is to be found in relationship of banker and depositor and because of the custom and business usage among bankers and depositors for the former to render the latter statements and vouchers and a duty upon the latter to make reasonable examination to determine their correctness. We repeat that the transaction involved in the present case is not one arising from the relationship of banker and depositor but is entirely outside of that relationship.

In the third affirmative answer no loss to the defendant is alleged. It appears from the bill of exceptions (77) that the property of Turrell was attached as soon as the forgery was detected. It further appears from the fourth affirmative answer (39) that Turrell

had turned over to a trustee all of his property, and from page 73 of the transcript it appears by stipulation of the parties that this affirmative defense was eliminated from the consideration of the jury, it having been agreed that the defendant, if held liable in this action, should share in the trust fund.

Whatever may be the rule as to estoppel without proof of loss by reason of the depositor's negligence where the negligence relates to matters of account between the bank and depositor, it would seem clear that where the transaction is not concerned in the accounts and there is no opportunity for the application of the doctrine of account stated, that then the general rule that to create an estoppel there must be a loss upon the party asserting the estoppel would apply. This as a general rule cannot be questioned. In the case of *Blum vs. Whipple*, 194 Mass. 253, 80 N. E. 501, it was applied in a situation very similar to the one presented in this case. The action was for conversion of two checks payable to the plaintiff and endorsed without plaintiff's authority by one Newman to the defendants. A defense was set up that the defendant had delayed for two years after knowledge of the forgery in notifying defendant thereof. It was held that this was not sufficient as a defense unless it appeared that some loss was suffered by reason of the delay. The court said:

“Nor did the plaintiff receive any benefit from Newman's acts as in *Bingham vs. Peters*, 1 Gray 139, nor was there any legal duty incumbent upon the plaintiff to give prompt notice of the facts and

of the claims to the defendant; its delay to be nothing more than one of the circumstances to be weighed against it. (On the issue of ratification)

* * * Here, as in that case, (*Murphy vs. Metropolitan National Bank*, 191 Mass. 159, 77 N. E. 693, it did not appear that any loss was caused to the defendants or that their position was in any way changed by the failure of the plaintiff to notify them earlier than it did. *Hamlin vs. Sears*, 82 N. Y. 327. Indeed it affirmatively appears that the plaintiff, as soon as it learned of these transactions, instituted criminal proceedings against Newman but that he has never since been located * * *; and these facts are competent to show that the defendants have not been injured by plaintiff's failure to give them any earlier notice."

The decisions cited by the court below, in its opinion on the demurrer (42) are not in point. The case of *Union National Bank vs. Farmers and Mechanics National Bank*, 271 Pa. 107, 114 Atl. 506, was a case of where the plaintiff drawee bank of a forged check attempted to throw the loss upon the bank immediately remitting to plaintiff. The facts and the plaintiff's theory of the case are quite complicated. Admittedly a drawee bank is presumed to know the signatures of its drawer and where it pays money on the forged signature of the drawer the loss falls upon it. The bank contended, however, that this did not apply where the remitting bank was negligent in not discovering the forgery. It was not alleged that the defendant bank

was negligent but it was alleged that the bank that paid the money to the forger and remitted to the defendant bank was negligent and that the defendant bank had, at all times, sufficient money to charge the item back to the bank originally remitting. It will be observed that this was an action for negligence and it was very properly held that as it appeared that the drawee bank was likewise guilty of negligence in not notifying the remitting banks of the forgery that there could be no recovery. Any language used in this decision should be read in connection with the facts involved, which bear no similarity to those in the instant case.

The case of *McNeely Co. vs. Bank of North America*, 221 Pa. 588, 70 Atl. 891, involved forgeries by an employee of the plaintiff depositor of the names of payees on checks drawn by the plaintiff on defendant bank. The checks were returned to the plaintiff by the defendant without protest by them although they knew that they were forgeries. It is held under these facts that the plaintiff was estopped to assert liability on the part of the defendant even though no loss was shown by the defendant. This case illustrates the application of the minority rule where vouchers had been returned which show or should have shown the fact of the fraud. A large number of cases opposing the doctrine of this case, many of which have been cited *supra*, are stated in note to this case in 20 L. R. A. N. S. 79. The case of *U. S. vs. National Exchange Bank*, 45 Fed. 163, is also a case where the name of the payee had been forged and the check had been returned to the United States Postal

Department and no notice had been given the bank of the forgery. This case, it is apparent, involves the situation where the forged check was the subject of account between the depositor and the bank.

The court below, in its opinion (42) on the demurrer to the third affirmative answer, stated:

"The rule seems to be, as it respects loss through forgery, that the opportunity to proceed against the forger is a valuable one, the deprivation of which, by failure to give notice promptly, conclusively determines that loss has resulted, for there is no way by which it can be satisfactorily determined that there was no loss, unless it be shown there is on hand a fund belonging to the forger out of which the defendant can reimburse himself in whole or in part."

We criticise the statement of this rule because it is made to apply to all cases of fraud. In fact its application is restricted to those cases where, by reason of accounts being exchanged between the parties through the custom of the banking business, a duty is cast upon the party complaining of the forgery to examine the accounts rendered and supporting vouchers to determine their correctness. We further criticise the rule in that it states the minority rather than the majority doctrine in saying that by failure to give notice promptly the fact of loss is conclusively determined. Applying the rule as so criticised to the instant case we find that no account was ever rendered by the defendant to the plaintiff involving the particular checks concerned here and

further not only does it not appear that the defendant suffered loss but it affirmatively appears that by the prompt action of plaintiff the loss was recouped as far as possible from Turrell and the property so recouped was made available to defendant. By failing to observe these distinctions we contend that the court below committed the errors complained of in this branch of the case.

* * * *

The peculations of Turrell extended over a considerable period of time. While an employee of the plaintiff he accomplished the thefts involved in this action through the assistance, although unwitting, of defendant's officers and employees. The plaintiff has felt from the time that these transactions were first discovered and now feels that the negligence and fault of the defendant in paying to Turrell the face amount of the checks in cash in the manner that it did was astounding—a practice indulged in by defendant in entire contravention of the considerations of prudence and careful dealing with depositors that should, and generally do, characterize such institutions. The defendant, on the other hand, contends that the plaintiff was lax in its business methods in not discovering the fraud. Thus it appears that the system and business methods of two great organizations are on trial and this fact, as well as the substantial sum involved, renders this cause of consequence to the parties litigant, and to the business world as well. We respectfully submit that the rulings

of the District Court complained of were in error and require reversal of this case and necessitate a new trial upon proper issues.

Respectfully submitted,

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GENERAL CIGAR COMPANY, INC., a Corporation,
Plaintiff in Error,

vs.

FIRST NATIONAL BANK OF PORTLAND, a National
Banking Corporation,
Defendant in Error.

Brief for Defendant in Error

*On Writ of Error to the District Court of the United
States, for the District of Oregon.*

HON. CHARLES E. WOLVERTON, *District Judge.*

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STATEMENT

(The numbers in parentheses hereinafter refer to
pages of the Transcript of Record, unless otherwise
noted.)

The plaintiff is a corporation engaged in the whole-
sale and retail tobacco business with branches in a num-
ber of cities, including Portland, Seattle and Spokane.
The defendant is a banking corporation in the City of
Portland, Oregon.

The plaintiff brought this action to recover from the
defendant the sum of about \$10,000, being the total
amount represented by several checks which one Neil

W. Turrell cashed at the defendant bank between December 13, 1919, and December 1, 1920, the defendant later collecting them from the drawee bank. The checks were drawn by the plaintiff company payable to itself, some being drawn on a Spokane bank and some on a Seattle bank. They had been sent to the plaintiff's Portland office from its Spokane and Seattle offices respectively as an adjustment for merchandise forwarded to those branches by the Portland office.

Each check is made the subject of a separate cause of action in the complaint, but, all being the same in principle, only the first need be considered. The plaintiff brings the action upon the ground, as alleged in its complaint (3 and 4), that after the check had been received by the Portland office from the Spokane office and had been endorsed with a rubber stamp endorsement, described in the complaint, with the intention of depositing it, Turrell wrongfully and without authority converted the check and wrongfully and without authority cashed it at the defendant bank, and the latter received from the drawee Spokane bank the face of the check without crediting or paying the same to the plaintiff.

A demurrer (26) to the complaint on the ground that it did not state a cause of action was overruled. (29.)

The defendant for an answer denies (31) and puts in issue certain allegations of the complaint including the allegations that Turrell's taking and cashing the check was without authority.

As a first separate defense the defendant sets up affirmatively facts claiming to show that Turrell was not acting without authority.

For a second separate defense (34) facts are alleged setting up an estoppel against the plaintiff by reason of negligence and an account stated. That is, that Turrell had been in the habit of indorsing checks in the manner pointed out, and defendant, because of the authority vested in him by plaintiff, cashed such checks when so presented, and paid the money to Turrell for plaintiff, and the checks were thereupon paid to defendant by the drawee banks, and charged to plaintiff's account; that a proper audit or check of its books and business at Portland and Spokane and the accounts of Turrell would have disclosed to plaintiff the practice of Turrell; that during all the times mentioned there were monthly statements rendered and settlements made between plaintiff and defendant, and between plaintiff and the Spokane bank, and at such settlements plaintiff's cancelled checks and itemized statements of plaintiff's accounts with the respective banks were returned to it by defendant and the Spokane bank, and an account stated was had between plaintiff and each of such banks; that plaintiff at no time prior to January 1, 1921, made objection to such payments by defendant, or claimed that Turrell was without authority to transfer and receive the money on the checks; and that plaintiff by its silence has ratified and confirmed the acts of Turrell in so indorsing and receiving the money upon such checks, and is now estopped to deny that Turrell had authority so to cash the checks.

It is alleged as a third separate defense (37) that the plaintiff learned of the fraud of Turrell long prior to July 20, 1921, but did not notify defendant thereof until that date; that because of such failure to notify defendant promptly of the fraud, defendant was deprived of the opportunity to proceed against Turrell and thereby to obtain from him restitution for the wrong suffered until it was too late to recover anything.

Defendant's fourth separate defense (38) is an equitable defense alleging that the plaintiff recovered from Turrell certain property which the defendant had an equitable right to have applied toward any claim which the plaintiff should be held to have against the defendant by reason of the matters alleged in the complaint.

A demurrer (40) to defendant's third separate defense was overruled (42).

The reply (43) of the plaintiff traverses some of the new matters in defendant's answer, and admits Turrell's authority to deal with the checks in question to the extent of endorsing and transferring them to the defendant for deposit and then by check, drawing out the amount deposited.

The case was tried to a jury. The fourth separate answer, being an equitable defense, was not for the consideration of the jury and was left for the Court, the parties stipulating on the subject. (73.)

Summarized, the facts brought out at the trial are as follows: Prior to July 1, 1919, Neil W. Turrell had been employed by the plaintiff General Cigar Company as bookkeeper, and on that date he was promoted to the position of cashier of the Portland office of the com-

pany, which place he held during all the times the checks mentioned in the complaint were cashed by him. In that position he had charge of the office, of the cash, of the bank statements, and of all the books, records and accounts; he had authority to indorse checks just as the checks mentioned in the complaint were indorsed and to take them to the defendant bank and deposit them. He was the only one at the plaintiff's Portland office who had to do with the examination of returned bank statements and vouchers, and no one checked his doings and practices or any of the records over which he had control except at the annual audit. Written authority to draw checks on the plaintiff's account in the defendant bank was conferred upon him. The letter of authority appearing on page 74 of the transcript is the writing referred to, and that was the only written authority conferred upon Turrell. Deposits in the defendant bank were generally made by the plaintiff's bookkeeper but sometimes Turrell made them. The checks would be stamped with a rubber stamp indorsement such as appeared on the checks described in the complaint and deposited. The form of the indorsement was "Pay to the order of the First National Bank, General Cigar Company, Inc." No one checked up Turrell's examination of the statements and vouchers returned to the plaintiff by the defendant bank except at the annual audit. San Francisco was the audit center and returned vouchers, etc., were sent there from the various offices of the plaintiff.

In 1920 the business of the Portland branch of the plaintiff showed a leak. The plaintiff believed it to be a stock shortage and had the stock books audited, but

the auditors found nothing wrong. At the end of 1920 the business again showed a leak. On December 31, 1920, Turrell was discharged, his work having become careless and lacking enthusiasm. Another audit of the books and accounts failed to reveal the leak and no shortage was found in the stock. Turrell was requested by the plaintiff to, and did, remain a short time after his discharge and pretended to assist in the last mentioned audit. When that audit failed to catch the leak detectives were called in and they directed attention to Turrell. At the same time the plaintiff's San Francisco office, which was the company's audit center, and to which the cancelled checks were sent, discovered checks which Turrell had made payable to "cash" and received the money on, marking the corresponding stubs void or cancelled. Turrell was arrested and plaintiff took steps to attach certain of his property. On May 28, 1921, he confessed that he had embezzled funds of the plaintiff in two ways: 1. Drawing checks on the plaintiff's account in the defendant bank payable to "cash" and misappropriating the money; 2. Cashing the checks described in the complaint and misappropriating the money. These practices had run through a period of about a year. The plaintiff did not on said May 28, 1921, notify the defendant bank of the fraud claimed, and did not notify them of it at any time until July 20, 1921. Plaintiff's witness testified that it took until that date to make up a complete statement of the amount of the checks cashed as complained of in the complaint.

It appeared from the testimony that the checks were drawn and indorsed in the manner set forth in the com-

plaint, and were cashed by the defendant which, in turn, collected them from the drawee banks; and that except for the payments made at the time of cashing the checks, the defendant never made any payments to the plaintiff by reason thereof.

It appeared from the testimony that the checks in question were sent from the Seattle and Spokane offices of the plaintiff company as an adjustment for merchandise sent from the Portland office to those offices; that when the merchandise was shipped from the Portland office, it should have been noted and an entry made on the records at the Portland office, and when a check was received from the Seattle or Spokane office in payment, it should have been noted in the cash account and on the records at the Portland office; that if those entries had been made, Turrell's practice in cashing the checks would have been discovered, but that Turrell kept the entries and notations off the merchandise accounts, cash account and all other records. There were statements regularly exchanged between the Seattle, Spokane and Portland offices, which would have shown to the plaintiff Turrell's practice, had he not manipulated the statements both going out and coming in. No one supervised Turrell in these matters. It was testified by one of plaintiff's officials and plaintiff's chief witness that Turrell, having authority, as he had, to sign checks on plaintiff's account in the defendant bank, would have been within his authority had he deposited the checks involved in this case and immediately thereupon drawn checks to "cash", thereby wiping out the full amount of the checks deposited; and that he did that very thing in some instances; and that

even the practice of drawing checks to "cash" and misappropriating the money, which Turrell did to the sum of about \$7,000, was not discovered by the plaintiff during the year although those checks were shown in the returned statement and vouchers from the defendant bank to the plaintiff; and that the reason for the non-discovery was that Turrell himself received and examined the bank statements and vouchers without supervision.

It appeared that there were statements rendered monthly with vouchers to the plaintiff by the defendant bank and by the Spokane bank and Seattle banks.

It appeared that it is a matter of common banking practice to cash checks indorsed with a rubber stamp indorsement of the kind described in the complaint, and that frequently a business concern, desiring cash, draws a check payable to itself, and then indorses it with a rubber stamp indorsement of that kind and cashes it.

The case having been submitted to the jury, a verdict was rendered for the defendant and a judgment was entered thereon (53).

Before the case was submitted to the jury each of the parties requested that certain instructions be given the jury. Among the instructions requested by the *plaintiff* were the following:

"I instruct you that, in order for a person to be called upon to object to a wrongful or unauthorized course of practice it is necessary that he know the facts and know the practice, or that a reasonably prudent person or concern under similar cir-

cumstances would have had such knowledge in an ordinary intelligent conduct of his or its affairs. The question therefore becomes one of fact for you to determine and the burden of proof in this regard is also upon the Defendant, First National Bank, to show that the General Cigar Company, by giving in the matter of the Seattle and Spokane checks the attention and care which a reasonably prudent person under similar circumstances would have given them, would have discovered sooner than the General Cigar Company did discover, the method in which cash was withdrawn from the defendant bank on said out of town checks. The test in this regard is not what would have been discovered by the highest conceivable degree of care or by the investigation of a person abnormally suspicious, but only the care which an ordinarily prudent person or concern may reasonably be held to be bound to devote to its business and affairs under similar circumstances.” (119-120, Exception No. 13.)

“In considering the question submitted to you by the foregoing instruction, I instruct you that the checks which form the basis of this action and for which Turrell received cash from the First National Bank were drawn on out of town banks other than the defendant bank. The statements received monthly by the Plaintiff from the Defendant bank indicated only the state of the Plaintiff’s account with the Defendant bank and did not tend to indicate the state of the accounts on which the checks in question were drawn. Therefore, from an ex-

amination of those statements alone, the wrongful acts of Turrell in question would not be shown to the Plaintiff, nor could it thereby discover such wrongful acts of Turrell in cashing the checks in question. It would be necessary for the Plaintiff to check its accounts with the books of the out of town branches and the accounts that such branches had with the banks with which they did business. It is for you to determine as a question of fact whether the Plaintiff exercised reasonable care or was negligent in its system of checking the transactions between its Portland branch with the accounts from the various other branches. It is to be observed by you that the checks returned to the Spokane branch by the Spokane bank of deposit and to the Seattle branch by the Seattle bank of deposit, would not present any reason to believe that an irregularity had occurred since the Spokane and Seattle banks had a right, when receiving the checks through the First National Bank of Portland, with the approved rubber stamp indorsement of the General Cigar Company at Portland to the order of the First National Bank, to assume that these had passed through the hands of the First National Bank in a regular, proper and orderly manner and the Spokane and Seattle banks had the right to charge the amount of these checks against their respective depositors at those points." (120-121, Exception No. 14.)

ARGUMENT

We believe that none of the assignments of error relied on by the plaintiff can be supported, but, assuming that there were errors committed by the Court below, we submit that they were not prejudicial to the plaintiff since on the whole record in this case the defendant should have prevailed.

First, the undisputed facts appearing in the record are that the plaintiff learned on May 28th of Turrell's fraud in connection with the checks involved in this case and did not, until the following July 20th, notify the defendant of the fraud or that the plaintiff would hold the defendant bank responsible. *As a matter of law* that was an unreasonable time to wait, and under defendant's third separate answer was a complete defense to plaintiff's cause of action. That it took until July 20th for the plaintiff to ascertain the full extent of the misappropriations does not alter the situation.

It was said in *United States v. National Exchange Bank*, 45 Fed. 163, 167:

"There is, I think, another reason why the plaintiff should not recover. The department waited over a month, from about March 11th to April 17th, after having notice of the forgery, before returning the check to the bank, or giving any notice of its intention to hold the bank liable. This was, within all the cases, an unreasonable time to wait. The notice should have been given without unnecessary delay after discovery of the fraud, to enable the bank to pursue any remedy it might have against the forger or indorsers. *It is no doubt*

true that full knowledge of the forgery may not have been in possession of the government until the coming in of the special agent's report. But it was apprised of the fraud before March 15th, and knew substantially all that was afterwards reported of it by the agent. It certainly knew enough of it to put it upon inquiry." (Italics are ours.)

While it may have required until July 20th to ascertain the sum total of the misappropriations and all the details, it was, we contend, as a matter of law, an unreasonable time to wait before giving defendant notice of the discovery of the fraud and that the plaintiff would hold the defendant accountable.

Second, the record discloses that it was plaintiff's incredible and amazingly careless business methods and system which made the fraud of its agent possible and allowed him to continue to cash the checks in question throughout the period of a year without objection; and that even if the defendant bank had required Turrell to deposit the checks, he could have immediately drawn checks to "cash" on the plaintiff's account, as he was authorized to do, wiping out the deposit and misappropriating the money, and that practice would not have been discovered by the plaintiff and the fraud prevented; that in fact Turrell actually carried out such practice without discovery.

We submit that on those facts, together with the rest of the record as shown in the transcript, especially the testimony of plaintiff's chief witness (73-84), the plaintiff is not in equity and good conscience entitled to any money from the defendant bank.

Third, the defendant's demurrer (26) to the complaint should have been sustained.

The plaintiff has assigned eighteen errors which it avers occurred in the trial of this case. It has in its brief, however, specified only nine of those as errors (plaintiff's brief, pp. 8-10), grouping these nine relied upon under four heads, and evidently abandoning the other nine. We shall for the sake of definiteness treat the assignments of error individually as they appear in the Transcript of Record (127-153).

At the outset it is well to state certain fundamental propositions:

1. An error furnishes no basis for reversal unless covered by an assignment of error.

2. A party cannot complain of an instruction given by the Court which was justified by an instruction requested by that party.

3. If any portion of a requested instruction cannot properly be given, it is not error to refuse to give the instruction, though it contained much sound matter. That is to say, a court is not required to dissect a requested instruction. *Transportation Line v. Hope*, 95 U. S. 297, at top of page 301; *Beaver v. Taylor*, 93 U. S. 46, 54.

4. If any portion of an instruction excepted to is proper the exception cannot be sustained. *Beaver v. Taylor*, *supra*.

5. An exception furnishes no basis for reversal upon any ground other than the one or ones specially

called to the attention of the trial court. *United States vs. U. S. Fidelity Co.*, 236 U. S. 512, 529; *Robinson & Co. vs. Belt*, 187 U. S. 41, 50.

The First Assignment of Error (127):

The first error assigned (127) is the overruling of plaintiff's demurrer to defendant's third further and separate answer. It is claimed that the ruling was error for two reasons; 1st, that no duty rested upon the General Cigar Company after it had actually discovered Turrell's fraud, the burden of which it now seeks to throw upon the defendant, to notify the defendant of the fraud and give the defendant an opportunity to proceed against the wrongdoer, and thereby obtain restitution from him; 2nd, that it does not appear from the answer demurred to that the defendant suffered any damage from the failure of the plaintiff to so notify it.

The opinion (42-43) of the court below on overruling the demurrer succinctly treats those matters and we shall here quote it:

"It is averred by the third defense that plaintiff was apprised of Turrell's fraud a long time prior to its notification of the defendant, and that, by reason thereof, defendant was deprived of its opportunity to proceed against the wrong-doer, and thereby obtain restitution.

"The plaintiff challenges the sufficiency of this answer, and urges that, even if it were plaintiff's duty to speak, the defendant cannot avail itself of the failure to fulfill that duty unless injury has ensued.

“The rule seems to be, as it respects loss through forgery, that the opportunity to proceed against the forger is a valuable one, the deprivation of which, by failure to give notice promptly, conclusively determines that loss has resulted, for there is no way by which it can be satisfactorily determined that there was no loss, unless it be shown there is on hand a fund belonging to the forger out of which the defendant can reimburse himself in whole or in part. *Union Nat. Bank v. Farmers’ & Mechanics’ Nat. Bank*, 114 At. 506, 507; *McNeely Co. v. Bank of North America*, 221 Pa. 588; *United States v. National Exchange Bank*, 45 Fed. 163.

The present case is of marked analogy. An alleged agent of plaintiff has, through representation that he was such agent, obtained funds from the bank and embezzled them. Applying the rule, it is sufficient if it appears that the plaintiff failed to notify the bank promptly of the agent’s want of authority and embezzlement of the funds, and the bank was thus deprived of its opportunity to proceed against the wrong-doer. This constitutes a complete defense without the necessity of showing further that the bank could have recouped if it had been sooner notified.”

The well-settled and salubrious principle, relating to strictly commercial paper, that prompt notice of the discovery of fraud is required, is supported by the authorities cited in the foregoing opinion (*Union Nat. Bank v. Farmers’ & Mechanics’ Nat. Bank*, 271 Pa.

107, 114 Atl. 506, 507; *McNeely Co. v. Bank of North America*, 221 Pa. 588, 70 Atl. 891; *United States v. Nat. Exchange Bank*, 45 Fed. 163), and by the following: *National Exchange Bank v. United States*, 151 Fed. 402; *England Nat. Bank v. United States*, 282 Fed. 121; *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 97, at page 115.

In the case of *National Exchange Bank v. United States*, *supra*, it was said:

“In conclusion as to this topic, the rule, as we understand it, is in entire harmony with the fundamental principles of that portion of the commercial law which relates to giving parties to commercial papers notice of default. They insist on promptness, but ordinarily require no proof *pro* or *con* on the question whether damage resulted from delays.”

In the case of *England National Bank vs. United States*, the third paragraph of the syllabus is:

“Where the payee’s names on two checks were changed by drawer’s agent, and the checks showed no evidence of this change to an experienced cashier exercising reasonable care, and bank returned the cancelled checks to drawer within a week after they were cashed, and drawer at that time discovered the forgery but did not give bank notice of it until six months later, meanwhile seizing all property of defaulting agent, bank was discharged from liability for paying these checks.”

It was said in the case of *Leather Manufacturers' Bank vs. Morgan supra*:

“Still further, if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by attachment of his property, or other forms of proceeding to compel restitution. It is not necessary that it should be made to appear, by evidence, that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. Whether the depositor is to be held as having ratified what his clerk did, or to have adopted the checks paid by the bank and charged to him, cannot be made, in this action, to depend upon a calculation whether the criminal had at the time the forgeries were committed, or subsequently, property sufficient to meet the demands of the bank.”

The case of *Blum vs. Whipple*, cited in the brief of the plaintiff, is merely an expression contrary to well-settled law.

The principle approved by the trial judge, is limited to strictly commercial paper; but it is not confined, as plaintiff contends, to the relationship of banker and depositor. The case of *Union National Bank vs. Farmers' & Mechanics' National Bank*, 271 Pa. 107, 114 Atl. 506, cited above, did not involve that relationship. There can be no sound reason for making any such limitations.

Coming back now to the ruling on plaintiff's demurrer, it is to be pointed out that if the plaintiff had a duty to promptly notify the defendant, the demurrer was properly overruled; for the answer demurred to expressly set out that the failure of the plaintiff to promptly notify the defendant of the fraud deprived defendant of the opportunity to obtain restitution from the wrongdoer until it was too late to recover anything from him. On the demurrer only the complaint was before the court and its allegations must be taken as true.

We believe, however, that sound principle and the authorities hereinbefore cited show that it is sufficient if it appears that there was a deprivation of the opportunity to promptly seek restitution from the wrongdoer, *and it is not necessary that it appear that benefit would have accrued to the bank from such efforts.*

Hereinafter in considering the 16th and 17th assignments of error this matter will again be alluded to.

Second Assignment of Error (128)

It is assigned as error (128) that the Court refused to allow the plaintiff to recall Witness Louisson for the purpose of impeaching defendant's Witness Jones.

Since this assignment has evidently been abandoned, it suffices to say that in the first place the ground for impeaching the Witness Jones had not been properly laid; and, secondly, even if it had been, it was surely within the trial Court's discretion to refuse to allow the plaintiff to recall Witness Louisson a second time to

impeach the Witness Jones on the very same matter Louisson had just previously been called to the stand to impeach him on.

Third Assignment of Error (135)

The third matter assigned as error (135) is that the Court gave certain instructions set out in plaintiff's Exception No. 2 (107). This assignment was also abandoned, and therefore we merely make the brief comment that not only is the instruction sound, but also it must be observed that no ground was assigned for the exception taken (107, Exception No. 2), and further that, whether right or wrong, the instruction was justified by instructions requested by the plaintiff itself.

Fourth, Fifth and Sixth Assignments of Error (136-40)

The fourth, fifth and sixth assignments of error (136-140) are directed at the following portions of the instructions given to the jury:

“As it respects the second answer, it is a rule of law that a depositor must examine the bank's periodical statements and report to the bank without any unreasonable delay any errors he may discover, or the bank may regard his silence as an admission that the entries as shown are correct.

It is alleged, among other things, that at all times from July 23, 1919, to December 15th, of the same year, the plaintiff, in addition to the three accounts carried in the defendant bank, carried accounts in the Spokane & Eastern Trust Company,

of Spokane, and the Union National Bank, of Seattle, and that each of these banks, including the defendant bank, rendered a monthly statement to plaintiff of its account therewith; that thereby the plaintiff was advised as to the exact condition of its account in each of these banks, respectively, touching the amounts of money drawn from the bank by Turrell, but made no objection thereto, and gave the bank no information touching any irregularity affecting such accounts.

If you find from the evidence in the case that such were the facts, and that the plaintiff was so advised and failed, within a reasonable time, to advise the defendant bank of such irregularities, then the plaintiff would be estopped now to assert that defendant was liable for its acts in paying the money over to Turrell in pursuance of his request or demand, and your verdict should be for the defendant.

And in this relation, I further instruct you that a depositor who has permitted his agent to verify the bank's statements is charged with notice of the fraud which would be disclosed by the examination of such statements, though not with the agent's knowledge of the fraud he may have acquired otherwise than through such statements.

If you believe from the evidence a reasonably careful examination of the monthly statements rendered and cancelled vouchers returned to the plaintiff, General Cigar Company, by the defendant, First National Bank, and the Spokane &

Eastern Trust Company, would have disclosed to the General Cigar Company the fact that the checks involved in the first, fourth, fifth and ninth causes of action had not been credited to the General Cigar Company's accounts with the First National Bank, and if you also believe that prior to July 20, 1921, the General Cigar Company made no objections concerning plaintiff's account with defendant or the cashing of these checks, you must find for the defendant on the first, fourth, fifth and ninth causes of action.

If you believe from the evidence that a reasonably careful examination of the monthly statements rendered and cancelled vouchers returned to the plaintiff by the First National Bank and the Union National Bank would have disclosed to the General Cigar Company the fact that the checks involved in the second, third, sixth, tenth and eleventh causes of action had not been credited to the General Cigar Company's account with the First National Bank, and if you also believe that prior to July 20, 1921, the General Cigar Company made no objections concerning plaintiff's account with defendant or the cashing of these checks, you must find for the defendant on the second, third, sixth, tenth and eleventh causes of action."

(Bill of exceptions, pp. 109, 110, supra.)

The grounds, and the only grounds, given to the trial court when the exceptions were taken to the foregoing were: 1. There was no evidence in the case to

justify any such finding by the jury. 2. "The delay could not have injured the defendant in regard to the fraud occurring prior thereto." (109-110.)

What the plaintiff seems to mean by the first ground is that the General Cigar Company as a matter of law had no duty to examine the statements rendered by the defendant bank in the light of information the plaintiff received from the statements rendered by the Spokane and Seattle banks. That is to say, that although the Seattle bank statements and vouchers informed the plaintiff that a check, drawn by the plaintiff on the Seattle bank payable to itself and sent to the Portland office, had passed out of the hands of the Portland office through the defendant, First National Bank, and had been presented to the drawee, Seattle Bank, and paid by it, the plaintiff would not be called upon to object to the statement rendered by the defendant when the statement informed the plaintiff that the defendant had not given plaintiff's account credit for the check as it is claimed should have been done. That argument overlooks the fact that in this case, both the statement of the drawee bank and that of the defendant bank informed the plaintiff concerning the check. The statement and voucher from the Seattle bank informed the plaintiff that the money on the check had been received from the drawee by the defendant; and the defendant's statement showed that no credit was given the plaintiff's account by the reason of the check. Only by the most artificial sort of reasoning can the plaintiff while contending that the checks should have been taken for deposit and not cashed, claim the right to ignore the in-

formation from the Seattle and Spokane statements in connection with the examination of the statements rendered by the defendant bank.

Plaintiff's brief cites and quotes extensively from the case of *National Bank of Commerce vs. Tacoma Mill Co.*, 182 Fed. 1, to prove the error of the trial court in this particular. It is significant that the Trial Judge, Hon. Charles E. Wolverton, who gave the instructions complained of, himself wrote the opinion in *National Bank of Commerce vs. Tacoma Mill Co.* when sitting as a member of this Honorable Circuit Court of Appeals. He must have known how far that opinion was intended to go and that it did not conflict with instructions given in our case. In the *Tacoma Mill Co.* case the Court was dealing with an entirely different state of facts. *There the Mill Co., the Court said, would have had to send out to its customers for statements of their accounts* in order to be informed that checks which should have been deposited had in fact not been credited to its account at the bank. We agree with the Court that to require that would be going too far. The *Tacoma Mill Co.* was *not* the *drawer* of those checks, as well as the payee—hence there were no statements from a drawee bank to be considered.

The second ground of the plaintiff's exceptions—that the delay in objecting could not have injured the defendant bank in regard to fraud occurring prior thereto—is not well taken. If the failure to object to the bank's statement works an estoppel at all, it surely covers the transactions which the statement

should have involved; in fact, those are the very transactions affected. Certainly no argument is needed in support of this.

The United States Supreme Court case of *Leather Manufacturers' National Bank vs. Morgan*, *supra*, is one of the hundreds of cases which establish that. The plaintiff evidently misconceives the nature of the principle involved.

Another point urged by the plaintiff is that, even though negligent and derelict in its failure to examine the statements properly and make an objection, still the defendant is thereby relieved from liability to it only to the extent of damage actually shown. Again we say that there is an entire misconception of the principle involved. It is a matter of ratification by the plaintiff of what has been done. *Leather Manufacturers' National Bank vs. Morgan*, *supra*, covers that point also. Any cases to the contrary are sports in the garden of law, and certainly unsound.

The propriety of the court's instructions hereinabove quoted is further questioned in the plaintiff's brief on the ground that the negligence of the defendant should have been covered in those instructions. Even if that ground were otherwise justified (and we submit that it is not, in view of all instructions), it cannot furnish a basis for reversal in this case, since it was not called to the trial court's attention in taking an exception to the instructions (108). *United States vs. U. S. Fidelity Co.*, *supra*; *Robinson & Co. vs. Belt*, *supra*. Not only was no objection made to the instructions on that ground, but the plaintiff requested no instructions on

the point, all of which would, of course, lead the court to believe that the party was satisfied with that phase of the instructions.

There is still another reason, however, why error could not be predicated on the instructions now complained of. The instruction requested by the *plaintiff* (120-121, Exception No. 14) which is set out in full on pages 9-10 of this brief concludes it from objecting. The instruction requested contains matter to the effect that a checking of the statement rendered by the defendant bank in connection with the statements rendered to the plaintiff by the Spokane and Seattle banks would be necessary to detect that the checks meant for deposit were not deposited, and that it is for the jury to determine whether the plaintiff used reasonable care in that particular. Certainly the inference from the requested instruction is that there is a duty to so check the statements, and no question of the defendant's negligence is involved.

Still another reason for the impotency of the claim of error is that, from a mere reading of the portions of the instructions complained of, it is evident that at least some matters therein were proper, and under such circumstances the exception of course fails.

Seventh Assignment of Error (140):

The seventh assignment of error is directed at the instruction given by the court to the effect that the burden of proof lay with the plaintiff to show that Turrell cashed the checks without authority. The instructions on the subject of burden of proof are as follows:

“Now, gentlemen of the jury, I instruct you further that the burden of proof lies with the plaintiff to show that the defendant bank paid out money without authority from the plaintiff, either real or apparent.

“Defendant has the burden of proof of showing that plaintiff was advised by statements of account of Turrel’s fraud and failed to notify defendant of its knowledge within a reasonable time.

“The burden of proof, gentlemen, is simply the weight of the testimony. It is such weight as would carry the scales of justice down upon one side or the other; and in considering the question as to whether these parties have made out their case by the burden of proof, as I have mentioned to you, you will determine whether the weight of testimony is upon that side.” (105.)

Another instruction pertaining to the burden of proof was given verbatim as requested by the plaintiff (although the plaintiff’s fourteenth assignment of error is that said instruction was not given):

“The question therefore becomes one of fact for you to determine, and the burden of proof in his regard is also upon the defendant, First National Bank, to show that the General Cigar Company, by giving in the matter of the Seattle and Spokane checks the attention and care which a reasonably prudent person under similar circumstances would have given them, would have discovered sooner than the General Cigar Company did

discover, the method in which cash was withdrawn from the defendant bank on said out of town checks." (104.)

We readily agree with the plaintiff that *the burden of proof as fixed by the pleadings never shifts. The question is, where is the burden of proof fixed by the pleadings in this case?*

The plaintiff seeks to conclude this question and establish error by invoking the rule of law, which is true in the abstract, that a party relying upon an agent's authority must prove it. In our case, however, there are two reasons why the burden of proving that Turrell acted without authority was upon the plaintiff.

First, the plaintiff has grounded its action upon a wrongful transfer of the checks by Turrell. If Turrell's act in cashing the checks was not wrongful, the defendant surely owes the plaintiff no money. The plaintiff's right to the money which the defendant received from the drawee bank relates back and is dependent upon, under the theory upon which plaintiff has brought its case, the wrongful transfer by Turrell. While the plaintiff may have been able to frame a case against the defendant without making the fact that Turrell "wrongfully and without authority transferred said check to defendant" a necessary allegation, we submit that such was not done. It must be borne in mind that the action is not one to recover a deposit. The action is grounded on the fact that the check was cashed and not deposited. In the pleadings plaintiff admits that Turrell had authority to transfer the check to the bank in one way, that is, to endorse and deposit it, but claims

that he transferred it to the bank in an unauthorized way, that is, by cashing it. Now, if Turrell transferred the check to the defendant with authority, the plaintiff could not recover from the defendant in this sort of an action. Hence it was necessary for the plaintiff to prove the wrongfulness of the cashing of the check. The plaintiff's claim, in the action as brought, depends upon Turrell's wrongfulness in cashing the check. *If the transfer was not wrongful the cashing was not wrongful.*

If the checks had been deposited with the defendant, and the defendant had then paid out the amounts to Turrell, we concede that it would in such a case be encumbent upon the defendant in a suit against it to recover the deposit to show that it paid out the money to an authorized agent.

In the case of Despatch Printing Company vs. National Bank of Commerce, relied upon by the plaintiff, the check was paid on the forged endorsement of the payee, and the *drawee* bank was being sued. It is a well-settled rule of law that a drawee bank must show that it paid a check on the order of the drawer. And, in addition, in that case the principal, in its pleadings, did not admit the broad authority admitted in our case, and so was not called upon to establish a limitation. Unless the case can be supported on one of these theories it is unsound.

Secondly, the allegations and admissions of plaintiff's reply (43-46) admit such a broad authority in Turrell in regard to checks and in respect to demanding money from the plaintiff's account in the defendant

bank that the plaintiff, depending on a limitation of that authority to exclude the cashing of checks with the defendant bank, would have the burden of proving that limitation.

It was said in the case of *J. L. Mott Iron Works vs. Metropolitan Bank*, 78 Wash. 294, 139 Pac. 36:

“At the commencement of the trial the court, at the suggestion of the respondent, ruled that the burden was upon the appellant to establish its non-liability to account to the respondent for the proceeds of the check, and over the objection of the appellant compelled it to assume the burden of proof. This, in our opinion, was manifest error. Clearly, had the appellant refused to introduce any evidence, judgment could not have gone against it on the pleadings, and this is one of the tests for determining on whom rests the burden of proof. This is made plain by a most cursory examination of the pleadings. The respondent, after averring the authority of Crane to make sales of its property on behalf and to collect debts, dues, and obligations, accruing to it therefrom, and incidental authority to collect and receive and indorse for deposit checks drawn to the order of plaintiff, was forced to aver, in order to state a cause of action against the appellant, that his authority was limited in these respects, and to aver that the appellant had knowledge of these limitations. When, therefore, the appellant denied that any such limitations existed, and denied further that it had knowledge of any such limitations, if they did in fact exist, it was

incumbent upon the respondent, before the appellant could be called upon to answer, to offer some proof tending to support them. Where agency is denied altogether, the burden is upon the party alleging agency to prove it, but where, as in this case, an agency to deal with the particular subject of the inquiry is alleged or admitted, and a special limitation is relied upon to avoid liability for certain of the agent's acts concerning the matters with which he is authorized to deal, the burden is upon the party asserting the special limitation to prove it."

"The rule was not changed because of affirmative matter alleged in the answer. This may have introduced an additional issue into the case, the question whether Crane had been held out by the respondent as their general agent, but it did not cast the burden upon the appellant to show there were no such limitations upon the agent's authority as the respondent alleged existed."

In our case the admission of the agency to deal with the subject matter was in the plaintiff's reply and not in the complaint, but that cannot change the rule: *for the burden of proof is made by the pleadings.*

It is to be remembered that the plaintiff admits by the pleadings that had the defendant credited the amount of the checks to the plaintiff's account and subsequently permitted Turrell to withdraw the fund, Turrell would have been within his authority. Plainly the plaintiff is depending on a limitation of the authority of one who is confessedly a broad agent to deal with the matter.

The fact that the defendant in addition to denying the lack of authority and the limitation of the agency, sets up itself affirmative allegations of a broad agency does not change the burden of proof, as is pointed out in the above quotation from the Mott Iron Works case.

That the plaintiff felt the burden of proof to be upon it to prove the limitation on Turrell's authority, and that it felt that the proof of the limitation was essential to its case, is evidenced by the testimony it adduced at the trial (See Bill of Exceptions, Mr. Louisson's direct testimony, transcript of record, 73-76).

We submit that as the issues were made in the pleadings it was essential to the plaintiff's case to prove the limitation in Turrell's authority and that his cashing of the check was wrongful; and hence the burden of proof in that respect was upon it.

Eighth, Ninth, Tenth and Eleventh Assignments of Error (141-145):

These assignments of error are abandoned by the plaintiff and not treated in its brief. Clearly they were not well taken. The court instructed much of the matter requested and the remainder was unsound, improper or irrelevant. And, besides, when part of a requested instruction is given, it is incumbent upon the party when taking an exception to the refusal to give an instruction requested to point out to the trial court the variance between the instruction given and the one requested.

Twelfth Assignment of Error (145):

This assignment of error grounded upon the refusal of the court to give a requested instruction, raised again the question of burden of proof which was treated above when considering the Seventh Assignment of Error. The argument therefore need not be repeated here. There are additional answers to this assignment, however, in that some of the matters contained in the requested instructions are clearly improper even assuming that others are proper. For instance:

“The bank can justify itself and prevent a recovery of this case only by proving that the money was placed to the credit of the General Cigar Company or was otherwise used for the benefit of the General Cigar Company, and, it being admitted that it was not credited to the General Cigar Company but was paid to Turrell, the bank must show that when it made a payment to Turrell, it was under Turrell’s authority paying the money to the General Cigar Company.’ (147.)

The above is clearly unsound in that it ignores all of the defenses of defendant except the one of authority. A court can rightfully decline to dissect a requested instruction in order to pick out the sound parts, and it is not reversible error to refuse to give such an instruction.

Thirteenth Assignment of Error (147):

The assignment is abandoned by the plaintiff. There was manifestly no error committed. The substance of part of the requested instruction was given; and a portion of the matter refused was merely an instruction on

the facts which the court had a right to leave for the jury without instruction; and a portion of the matter refused was clearly improper as limiting the factors and circumstances in the case from which the jury could find either actual or apparent authority.

Fourteenth Assignment of Error (148):

Here an error was assigned for refusal to give a requested instruction, which was in fact given by the court verbatim as requested. (104.)

Fifteenth Assignment of Error (149):

This assignment raises again the question of estoppel by reason of the return of vouchers and the rendering of statements, which was dealt with hereinbefore when considering the Fourth, Fifth and Sixth Assignments of Error. And here there is an additional answer to the claim of error in that much improper matter was contained in the requested instruction.

Sixteenth Assignment of Error (150):

This assignment of error is the refusal of the court to give the following requested instruction:

“The defendant bank as one of its defenses in this case asserts that the plaintiff, General Cigar Company, knew of the course of conduct on the part of Turrell with reference to the checks in suit, for a long time prior to communicating that knowledge to the defendant bank, and that the bank was thereby deprived of an opportunity to recover all or a part of the loss. I instruct you that by facts stipulated in this case, it appears that all of Tur-

rell's property was attached by the General Cigar Company at a time when it knew only of Turrell's embezzlement by means of checks payable to cash, not involved in this action, and that shortly thereafter the property so attached and all of Turrell's property acquired during the period of defalcation, was turned over to one J. H. Tipton as Trustee and that the question of the application of the proceeds of said property is one of law upon which this court will pass, the facts being admitted and it affirmatively appears from such admitted facts that no harm has resulted to the First National Bank by reason of any such alleged delay. I instruct you, therefore, to disregard the third further and separate defense on the subject of loss to the bank through alleged delay in notifying it of the claim which is the subject of this action." (150.)

The instruction was properly refused for several reasons. In the discussion hereinbefore when considering the First Assignment of Error (to which we now direct attention) it was pointed out by argument, citation and quotation that on principle and authority an unreasonable delay in reporting the fraud would relieve the defendant from liability in this case without showing any damage from the delay other than the deprivation of the opportunity to promptly seek restitution from the wrongdoer. As is often said by the courts, the opportunity is a valuable one and it need not appear that benefit would necessarily have accrued to the defendant from the effort. It cannot be said that the defendant could not have benefited had it received notice of the

fraud prior to July 20th, when it was notified. The defendant had a right to make its own efforts to recoup.

We submit that it would be no answer to the defendant's defense to show that the plaintiff had already proceeded to seize Turrell's property to cover other misappropriations before even learning of the fraud involved in this case. There is nothing in the record to show that the defendant could not have pursued proceedings which would have availed it something. At any rate, it is not now susceptible of proof that pressure on the wrongdoer by the defendant would not have aided the defendant. The requested instruction mentions a stipulation between the parties in regard to the defendant's *fourth* separate defense, this being the stipulation noted at page 73 of the Transcript of Record, but the terms of which are not shown at any place in the record. The statement in the plaintiff's brief at page 49 to the effect that by the stipulation the plaintiff agreed to allow the defendant to share in the property which Turrell had turned over to the plaintiff, *is an error*. No such agreement was ever made, and, furthermore, the plaintiff contends in its reply (50-52), and in every other instance in which the matter is mentioned, that it, with Turrell's active consent, applied the proceeds of the property, turned over by Turrell, to make good other misappropriations which Turrell had been guilty of, and not the misappropriations involved in this case. Furthermore, there is nothing to show that Turrell had not acquired other property between the time of the attachment spoken of and the time that the fraud involved in this case became known to the plaintiff. And

again, it is admitted by all that Turrell did not deed and assign the property to the plaintiff until after the plaintiff knew of the fraud out of which this case grows.

But there is another fatal reason why the plaintiff cannot claim error in the court's refusal to give the requested instruction. The plaintiff allowed the court to give *without objection* the hereinafter quoted instruction which left to the jury the third further defense of the defendant which the plaintiff's requested instruction would take away from the jury. The instruction not excepted to is as follows:

"As it appertains to the third further and separate answer, I instruct you that, if you believe from the evidence that plaintiff learned on or about May 28, 1921, of Turrell's fraud in connection with the moneys received from defendant bank on the checks involved here, and you further believe that plaintiff did not promptly notify the defendant that plaintiff would hold it responsible for such moneys paid to Turrell, then you will find for the defendant. Prompt notification would be such as a prudent man would exercise within a reasonable time, so as to advise of the situation." (104-5.)

The foregoing instruction not having been objected to, the court had a right to believe that it was satisfactory.

Seventeenth Assignment of Error (151):

The error here assigned is that the court refused to give a requested instruction in lieu of another that the court had refused to give, the refusal to give which was

assigned as error by the plaintiff under the Sixteenth Assignment of Error just considered.

The proper matters contained in the requested instruction were incorporated in the given instructions last quoted above. And the court very properly refused to instruct that the plaintiff could wait until it compiled all the data concerning Turrell's fraud before notifying the defendant of the fraud at all. Instead the Court left that question of reasonableness to the jury. And again, the requested instruction stated that the plaintiff notified the defendant of the fraud on *June 20th*, while the undisputed testimony was that notice was not given until *July 20th*.

Eighteenth Assignment of Error (153):

This assignment is directed at the denial of plaintiff's motion for a new trial on the grounds of the alleged errors involved in the assignments of error which have already been treated in this brief.

Taking the whole body of the instructions given by the court we submit that the law was properly presented to the jury. For a second time the trial court had an opportunity to consider the matters which the plaintiff claims were errors when the court was called upon to pass on the plaintiff's motion for a new trial. The court concluded that no errors had been committed. We submit that the conclusion is correct.

Respectfully submitted,

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